

LAW'S ONTOLOGY AND PRACTICAL REASON

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Thesis submitted for the degree of Doctor of Philosophy

Law School

The University of Edinburgh

April 2001



DECLARATION OF ORIGINALITY

I hereby declare that, except where otherwise stated, the research recorded in this thesis and the thesis itself was composed and originated entirely by myself at the Law School, the University of Edinburgh.

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ABSTRACT

The thesis is an attempt to reconcile law's dual nature, its factual dimension (its *facticity*) and its normative/evaluative dimension (its *normativity*), in a non-reductive manner. The tension between those two dimensions appears particularly acute when we try to discern some object of reference for our normative talk/discourse. Then the possibility of absence of such objects poses a high threat to the meaningfulness of the enterprise of law *tout court*. Faced with this danger lawyers usually end up reducing legal referents to physical, non-normative entities. Palpable for our senses as those entities may be, they do not seem to eliminate the threat of meaninglessness posed to the legal enterprise, as they end up eliminating law's normativity.

In contrast I argue that legal and broader practical norms can be reconstructed as abstract objects that are available to knowledge. The method employed, relies predominantly on a semantic explication of the 'objecthood' of norms along the lines of a neo-Fregean theory of mental content. Further, I employ an analysis of the meaning of legal expressions in order to show that a semantic account of legal 'objecthood' will be demarcated by the pragmatic-normative requirements that support the relevant practices in which legal meaning is generated (as is specified by some version of Wittgenstein's 'meaning as use' theory of meaning). I proceed to argue that those pragmatic requirements include some transcendental pragmatic norms which specify an ultimate practical or moral point of view against the background of which practical meaning is possible. Later, this point of view is specified as a Super-norm or Principle of Autonomy. This norm bestows an evaluative element upon the meaning of all practical expressions/sentences and, via the semantic explication of ontology, into the normative objects (rules, properties and so on) that correspond to them.

Finally, it is claimed that legal norms are a species of practical norms, to the extent that both fall under the same criteria of validity that are specified by the point of view of the Norm of Autonomy.

To my grandfather

Κλεόβουλο Α. Δενδρινό

(May 1899 – December 1996)

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ACKNOWLEDGEMENTS

No dissertation is exclusively the work of its author. This is probably even more true for the work at hand, which started at the *Christian-Albrechts-Universität zu Kiel* in Germany and went through many stages of change and modification before its submission at the University of Edinburgh in Scotland. Needless to say, there is little, if any at all, resemblance between the proposal that I presented back in 1996 in Professor Robert Alexy's *Doktoranden-seminar* and the final outcome. I want to believe fortunately so! For all the qualitative distance that separates that proposal from this final outcome there is a long list of credits.

Above all I would like to thank my three academic supervisors that have carried the weight of a supervision that lasted long and was at times rather difficult to co-ordinate, not the least so because I was so often moving around Europe! Professor Robert Alexy, Professor Neil MacCormick and Dr Aimilios Christodoulidis, have offered a supervision that has been more than exemplary in every respect. Robert Alexy has encouraged my philosophical explorations even in moments when my project seemed hopeless to me. A special thanks goes to Neil MacCormick for admirably succeeding (I am still not sure how!) to produce his detailed comments always in time despite his heavy workload as Member of the European Parliament. His enthusiasm for my project has been the main motivational force during the final year and a half of intense writing. Finally Aimilios has done no less than providing the close day-to-day supervision which elevates a draft to the level of a disciplined text.

Carsten Heidemann has been to me something like a guardian angel throughout the writing-up process. His devotion as a friend has exceeded by far any reasonable expectations and his close engagement with my project has in fact 'shaped' the whole thesis: a tireless reader, a rigorous critic and a connoisseur of both analytic and continental philosophy, he turned the solitary process of writing into a stimulating dialogue.

For those who know Timothy Williamson the fact that he spent a whole afternoon discussing with me my clumsy ideas on reductionism sounds normal. For me, however, that afternoon was one of the highlights of my research and helped me to clarify some rather complicated issues, even if the final result surely fails to live up to the level of Tim's comments.

Our small jurisprudence reading group in the 4/2 Advocate's Close flat, was one of the most stimulating and enjoyable moments in my hitherto academic experience. Tania Kyriakou, Claudio Michelon, Manolis Melissaris, Kevin Walton, and myself have made the

best use out of the beautiful Georgian flat which Helen Williams has decorated in an early twentieth-century Morris style.

I am indebted to the lecturers (Timothy Williamson, Rae Langton, Richard Holton) and the participants of the MSc *Contemporary Issues Seminar* at the Department of Philosophy at Edinburgh during the academic years 1999-2000 and 2000-2001, for giving me the opportunity to consolidate and expand my philosophical knowledge in an environment that pursues philosophy on the highest scholarly level. The same applies for all the reading groups and seminars organised during that time at the same department.

My shift into a more analytical method of pursuing questions in law coincided with my making the acquaintance of Sean Coyle, who in many ways convinced me for the rightness of that decision. I also thank him for entrusting to me a copy of his dissertation whose influence is apparent throughout the text. Professor Susan Hurley offered me her rich and insightful comments at an early stage of the writing-up process. I am sure that they saved me a lot of time in misguided research. Amongst the people that read parts of the thesis and offer detailed comments are also: Manolis Melissaris, Claudio Michelon, Kevin Walton, Phil Barker, Sara Kneale, Tania Kyriakou. To all of them I am mostly indebted.

Though not directly involved in the dissertation, I would like to pay an (enormous) academic debt, that is long due, to Professor Pavlos Surlas, Andreas Takis and Philippos Vassilogiannis in Athens. It was Andreas and Philippos who, back in 1990, introduced me to Professor Surlas' pioneering jurisprudence seminar. Since then Pavlos, Philippos and Andreas have never ceased inspiring my work through their writings and our discussions.

Two generous Scholarships from The Hellenic State Scholarships Foundation (I.K.Y.) and the Friedrich-Ebert-Stiftung (F.E.S.) have made the completion of this work possible. I am indebted to both foundations for investing their trust in my project.

Aristotle Kallis, Panos Koutrakos and Manolis Melissaris are not merely what one calls best mates but also fellow-travellers in a common walk of life. Aristotle has been a constant source of inspiration since we've known each other and if it wasn't for his influence this PhD might have never started. Panos' continual advice and his tremendous ability to restore my enthusiasm about what has been at times an exhausting project, deserve my unreserved gratitude. Being in constant contact with Manolis' relentless scepticism, I had to dispose of crude philosophical dogmas and try to adjust my 'defence' to the high standards of his argument. I thank him for that, as well as for the great times we had in the South Clerk street (especially when he was cooking!).

I consider myself extremely lucky for having had so many good friends around to

support me during the long process of thinking through and writing the dissertation, in Kiel, Hamburg and, finally, Edinburgh. In *Kiel*: Christos Efthymiadis, Evi Mergia, Corinna Rohloff, Christina Schröder, Rebecca Fricke, Thrassyvoulos Papadopoulos, Susanne Bracker, Maïke Haß. In *Hamburg*: Jan Burmeister, Chrissoula Pentheroudaki, Maria Voutsinou, Dimitris Doukas, Aline v. Drateln, Kostis Kuriakakis. In *Edinburgh*: George Papadopoulos, Alistair Henry and our memorable evenings in the Society and the Barony, Vagelis Makrygiannakis, Dimitris Halvatzaras, Gillian Cuthill, Louise Davidson, Stavroula Fylachtou, Joanna Charlton, Silvana Vitale, Marina Drimili, Tom Trivnan, Daniel Williams, Peny Travlou, Nikos Kourambas, Enrique and Omar Coronna, the people in the bookstop café and in particular Stella Thomson, Uta Staiger, Susan Dunlop. To all these friends I express my gratitude for turning the long process of the dissertation into a pleasant experience.

Nadja Kannelopoulou taught me that only hard projects are worth pursuing, even if they always involve a high amount of risk; I owe her much more than a few words could ever express.

Estelle Zinsstag has been the foremost source of inspiration in my life for the past two years. The completion of this dissertation is just the least of the achievements that the effect of her love and affection had on me. I can't wait for those to come...

My parents, Yiannis Pavlakos and Niki Dendrinou-Pavlakou and my brother Tassos Pavlakos have not only gratuitously financed my studies, but have lovingly stood by me in good and bad moments all these years. Knowing that they were constantly there for me in such a self-sacrificing manner, was such a reassuring feeling that I cannot imagine any of my achievements without it.

I dedicate the work I put into the thesis to my grandfather Kleovoulos A. Dendrinos, whose intellectual radiance has been inspiring me through the years and whose passing signalled for me the beginning of the qualms of adult life – from that moment on I had to carry the weight that knowledge and maturity entail by myself.

INTRODUCTION

The dissertation at hand is an effort to defend the claim that legal systems constitute *objective normative orders*. This claim is connected with a handful of requirements, however the dissertation is mainly interested in two of those, which it takes to be of central importance for the tenability of the claim. The first requirement consists in the thesis that legal vocabulary, and more broadly legal discourse, refers to genuine legal entities (properties, objects and facts). Put in a slightly different way, the first thesis argues roughly that it is possible to ascribe truth values to legal sentences/propositions on the basis of existing legal entities (facts, objects and so on). To that extent the first thesis is interested in law's objectivity *as objecthood*.

The second requirement concerning law's objectivity consists in the thesis that legal entities are action-guiding (or normative). On this second thesis a 'full-blooded' claim concerning law's objectivity requires, alongside with an ontological underpinning of legal discourse, an argument to the effect that legal entities, and in particular legal rules, are explicated as possessing genuine *action-guiding* content. In this respect the claim for law's *objectivity* is recast as a claim for *normativity*. However, once law's objectivity is argued to consist in the existence of action-guiding objects, a further dimension is introduced in the discussion: the dimension of *correctness* or *validity* of legal entities (predominantly rules). As soon as this further dimension is introduced, the content of objectivity is made in a strong sense dependant upon the idea of *normative correctness* or *validity*. The result is that the dimension of legal objecthood is tied up with the dimension of normative correctness. Now, unless one would want to undertake the difficult, if not impossible, task to argue that the standards for normative correctness vary with the 'domain' of action (law, morality and so on), a uniform treatment of the concept of normative correctness for all domains of the Practical seems to be the most appropriate way to tackle the issue of law's normativity. On that supposition, the discussion of law's objectivity is inscribed within an analysis of the standards for normative correctness *tout court*.

Reference to the importance of the interconnection between the aspect of law's normativity and law's ontology is what distinguishes the present effort from other recent endeavours which indeed undertake a much more painstaking analysis in making explicit the ontological groundwork of legal discourse[†]. Whereas those endeavours hold it possible

[†] Vide in particular the detailed monographs of: Sean Coyle, 'On the Foundations of Legal Reasoning in International Law', (unpublished doctoral thesis, University of Glasgow, 1998); and Carsten Heidemann, *die Norm als Tatsache. Zur Normentheorie Hans Kelsens*, Studien zur Rechtsphilosophie und Rechtstheorie: 13 (Baden-Baden: Nomos, 1997).

that an analysis of the ontological groundwork of legal discourse can be self-standing, the present effort maintains that the action-guiding character of legal rules and objects requires that law's ontology be explicated through an account of the concept of normative correctness, as a concept that can be specified only by using conceptual categories from the area of practical reason.

Roughly, the reason for this conjoined treatment of objecthood and normativity rests on the basic intuition that if there is something that can be known objectively and, further, possesses the ability to guide one's action, then one has a fundamental interest to know whether that thing guides one's action in a right or in a wrong way. If, in contrast, agents are denied this self-reflective dimension concerning their action, they would figure as being self-contradictory. Once the interest in (normative) correctness is granted, objectivity concerning the existence of normative objects stretches towards including the criteria of the correctness thereof. But then the criteria for the correctness of normative objects will obviously lay down conditions or standards for the validity or the existence of those objects. As a result, objecthood and existence in the domain of the Normative will depend on correctness/validity: existing norms will be those norms that are correct. This is not to say that it is not possible to conceive of normative entities, say rules, that are wrong; of course we can. The point is, however that those rules will be invalid, hence non-existent.

Alternatively the evaluative character of normative existence emerges through reference to the notions of normative possibility/actuality. In this context there is a broken analogy between the notions of *physical* possibility/actuality and those of *normative* possibility/actuality (i.e. validity): in the domain of the non-normative, physical environment one can refer, by employing non-normative vocabulary, to possible combinations of the material blocks that put together the actual world. Then, admittedly, what could possibly exist somehow depends on what actually exists; but actuality does not really constrain the notion of possibility; things could have been otherwise; 'actuality' is more a matter of convention that derives from the fact that we happen to inhabit this combination of things (world) than another. Conversely, if one employs normative vocabulary in order to talk about possible normative entities, one's imagination will be constrained by something like a notion of *normative actuality*, where, this time, actuality stands for correctness or validity; to that extent, actuality in this context is not a neutral concept; it is a concept that incorporates the evaluative dimension of correctness/validity. Connectedly the notion of *normative possibility* is not neutral either: not any combination of normative building blocks would be equally good. Only the combinations that amount to *normatively correct* results would do. The broken

analogy merely points to a deeper difference between the concepts of physical and normative existence: in the domain of the normative environment 'existence' incorporates the additional parameter of *correctness* with the result that the concepts of possibility and actuality refer only to correct normative entities.

Resting on the implicit evaluative character of normative existence/objecthood the dissertation will argue that legal phenomena cannot be reduced to other non-normative phenomena because they constitute an order which *first* is real (existing) and *second* normative (action-guiding). The *reality* of the legal order will be founded on an account of law's ontology. The *normativity* thereof will emerge through an account of law's action-guiding content. Using arguments from contemporary discussions in metaphysics and ontology, the *ontological structure* of the legal domain will be identified with the *semantic structures of legal language* (this is labelled the *semantics-exhausts-ontology* thesis). Conversely, *law's action-guiding content* will be accounted for through an analysis of the *pragmatic level* of legal language. Throughout the dissertation the two levels of the semantic-ontological and the pragmatic-normative analysis will be related to each other through the idea of *anti-representationalism* about mental content. Along the lines of this idea it will be suggested that the patterns of agency are constitutive in specifying mental content and its semantic structure. Furthermore, in this context, the normative patterns of agency will be argued to be constitutive for a semantic account of ontology. Transferred in the area of legal phenomena, this thought will offer a robust underpinning of the thesis that an anti-reductionist account thereof needs a combined account of law's objectivity and law's normativity. More specifically the project unfolds in the following order:

Part I (Ch I) of the thesis serves as an introduction to the main themes along which the anti-reductionist account of legal phenomena will unfold. Chapter I focuses mainly on Hart's dissatisfaction with the pre-existing accounts of the concept of law which he dismisses as reductionist. Hart's proposal of an internal or evaluative aspect of social rules that would account for the irreducibility of legal rules is interpreted as suggesting the need of an account of the evaluative/normative aspect of legal rules. However, Hart's idea of an internal aspect of rules is dismissed on the grounds of being based on the subjective psychological category of commitment. In contrast, it is argued that the concept of law's normativity refers to normative objects/facts that are mind-independent and can be accessed through cognitive operations.

Connectedly part 2 (CHs II-IV) of the dissertation offers some basic insights into the ontology of 'legal' and generally 'normative' properties and broadly entities and objects.

It opens by arguing that normative concepts (and broadly expressions) are irreducible to non-normative ones because they correspond to properties (and broadly entities) that are genuinely normative. The argument concludes by stating that even if it were possible to use non-normative vocabulary in order to refer to normative properties, as supervening on a more basic 'physical' level, we would still have to presuppose the existence of legal rules, as self-standing legal objects, in order to account for legal properties as supervening to more basic physical properties of the one or the other sort. Thus in regard to legal rules it is dispensed with supervenience even in a weak form (Ch II).

The method employed throughout part 2 for the analysis of legal objecthood exploits the possibility to account for 'what there is' through the semantic structures of our sentences/propositions (this is labelled as the *semantics-exhausts-ontology thesis*). Resting on this possibility the account ascribes to legal norms the status of abstract normative objects that form part of the environment, in a way analogous to that of concrete (physical) objects. To that extent the analysis offers an account of the mind-independence and the possibility for objective knowledge about legal norms without succumbing to some bold form of metaphysical realism. On the other hand special effort is made not to succumb to any form of idealism either: the semantics-exhausts-ontology thesis is accepted on two conjoined conditions: first that it is possible to individuate mental or intentional content (i.e. the content of beliefs, desires and so on) via semantic or linguistic structures; and, second, that mental content so individuated is about the environment and not any internal mental representations (rejection of the mind-world dualism).

In all, part 2 of the thesis does not directly address the evaluative/normative aspect of legal entities. In fact, it somehow takes it for granted and confines itself in delineating the ontological status of legal entities. Along these lines, it develops a corroborative effect in connection to Hart's claim for the irreducibility of legal concepts and normative propositions by resting a case for the ontological autonomy of their counterparts. In contrast, part 3 attempts to articulate the special link between the fact that there are ontologically primitive legal entities and Hart's idea that legal expressions/sentences incorporate an evaluative aspect or dimension. The link is granted on the basis of the semantic account of the ontology of legal entities: the semantics-exhausts-ontology thesis consists of two aspects. The first addresses the issue of the reference of legal expressions and the subsequent problem of reductionism. The second relates to the issue of meaning or sense of legal expressions and sentences. Any expression that, on a formal-structural level, refers to objects and properties it does so only through its being intelligible as meaning, on a pragmatic-substantive level,

something by the members of a linguistic community who employ that expression. Now in order to account for meaning one needs to focus on the pragmatic conditions under which an expression is employed or used (in this respect it is argued that Wittgenstein's theory of 'meaning as use' is perfectly adequate for an account of legal meaning). The conclusion is that those pragmatic conditions will be constitutive for the account of the ontology of legal expressions to the extent that the semantics-exhausts-ontology thesis is valid.

Part 3 (CHs V and VI) of the essay devotes itself in making explicit the normative (action-guiding) character of the pragmatic conditions of (legal) meaning. These conditions are reconstructed as conditions for the validity or the correct use of legal expressions/sentences. To the extent that those pragmatic conditions are common for the correct use of all normative expressions (moral, ethical and legal), the analysis will allude to something like a *connection thesis* between law and morality (Ch V). The connection thesis mainly holds that once a concept or expression is shown to be evaluative/normative, it cannot be treated separately from all other concepts and expressions that involve evaluations. The analysis begins with the formal-pragmatic rule that introduces the claim to correctness. This rule introduces, as it were, the evaluative dimension of normative discourse. According to it all normative statements raise a claim to correctness as a condition for their proper employment. The claim to correctness is a necessary pragmatic presupposition that applies universally to all legal (and broader normative) propositions and whose necessity is argued on the basis of a transcendental argument (Ch V). Thus, in a way, the claim to correctness introduces the evaluative dimension by alluding to something like a *practical bivalence principle* according to which all normative statements are either right or wrong.

The plausibility of a notion of practical bivalence depends on an additional, substantive, condition: a corpus of action-guiding norms that provide for the substantive criteria of normative/practical correctness *tout court*. These norms can be thought as putting together an ultimate substantive point, a kind of 'point of all points', which is akin to the point of view of morality or practical reason. In pursuing the content of the moral point of view I will employ the methodology of Karl-Otto Apel's and Jürgen Habermas' *Diskurstheorie* and locate the rules that constitute it at the level of the bedrock of our every-day communicative practice as intentional agents (CHs V and VI). The content of those rules will be reconstructed against the background of that practice, as a presupposition of its intelligibility (Ch VI). Finally, the moral point of view will take the form of a Fundamental Norm of Autonomy that treats all potential participants in the practice as autonomous persons (Ch VI). This is the principle which every agent ought to, or rather, already presupposes when acting as

participant of the communicative practice[‡].

‡ In order to anticipate any criticism of normative centralism, I would like to emphasise that the proposed concept of *personhood* is not prior to moral/practical discourses. The relation between the two is rather dialectical and the concept of *personhood* is gained through a reconstruction of actual practical discourse. In fact the concept of *personhood* is a *transcendental* assumption that one has to make for it all to make sense. But on the other hand this assumption is not entirely circular, because it is not the case that we first need the assumption in order to have an intelligible picture of moral discourse, but rather that we already are making sense of what is going on; hence, that the assumption is already valid as we go along. At the same time the normative power of the transcendental conception of persons lies in its keeping us on track and prescribing the course of our moral practice. All these claims are discussed in detail in CHs V and VI.

PART ONE

LEGAL CONCEPTS AND THE CONCEPT OF LAW

CHAPTER 1

H. L. A. HART'S CONCEPT OF LAW

INTRODUCTION

Hart's reflections on the concept of law were initiated largely by his dissatisfaction with the command theory of John Austin which at the time was the prevailing theoretical explanation of law's normativity. Hart questioned decisively the ability of this theory to account for the normativity of legal and social rules in general¹. The explanatory formula 'command plus sanction plus habitual obedience', stipulated by Austin, was not as sufficient a criterion as to be able to distinguish legal norms from other imperatives of the form 'order plus threat'. An order from a gunman to pass him the money could not, Hart's objection goes, be distinguished from the obligation of the buyer to pay for the goods he purchased. This inability, Hart pointed out, amounted to a conflation between the notion of 'having an obligation' (i.e. the point of view of normativity) and being obliged (i.e. the case of brute force). These considerations which mark the Concept of Law from its early pages² encapsulate the reproach of reductionism against command-type theories while, at the same time, launch Hart's attempt for a more appropriate account of law's normativity.

In contrast to those theories, Hart advances an account of normativity that rests on a twofold claim: *first* that normativity cannot be put together along the lines of the description of a series of empirical facts; *second* that normativity (and further law itself) has to be located within social practices which confer an evaluative component to legal rules, with the effect that their addressees know to 'have an obligation' rather than to 'be obliged'. Both these claims reflect Hart's belief that legal rules cannot be reduced to empirical description because they possess an evaluative aspect which derives from their social context³. This aspect of the rules, which Hart calls the *internal point of view*, is related to the critical re-

1 Vide H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1997), Ch II. For a brief albeit accurate introduction to the main ideas of Hart's work, vide B. Bix, *Jurisprudence. Theory and Context*, 2nd edn (London: Sweet & Maxwell, 1999), 31-49.

2 Vide *Concept*, 6-17.

3 For a comprehensive discussion of these issues vide N. Stavropoulos, *Objectivity in Law* (Oxford:

flective attitude of the addressees of law and functions as a source of reasons for action, criticism or justification.

Resting on those theses Hart pursues a critique of the existing semantic accounts of legal expressions while endeavouring to offer a fresh account of legal and broader normative meaning. His semantic considerations are mainly advanced through his *open texture thesis* (and its earlier version, the so-called *defeasibility thesis*). This is a thesis about the indeterminacy of the meaning of legal concepts and rules. It mainly aims against *definition* or *criterial model* theories, or theories that try to capture the meaning of a concept by ‘freezing’ the ‘nuclear’ semantic components of the concept into a definition⁴. Those theories, Hart believes, are intertwined with the bad ontology that underlies command-type theories of normativity; namely the idea that rules are empirical entities that can be analysed into their physical counterparts. In contrast to those theories, Hart’s firm belief seems to be that rules are not empirical entities and therefore lack physical counterparts since normativity is an evaluative concept which relates to social contexts rather than to reduced empirical facts⁵. On these grounds Hart advances a combined attack on both the levels of ontology and semantics in order to block the reductionism of normative phenomena.

This chapter will argue that Hart fails to offer a proper account of rules’ evaluative aspect, proper in the sense of being able to account for normativity in the place of the rejected models. One important reason for that is that the rejection of rules’ *objecthood* threatens with the loss of their *objectivity*. Their insufficiency notwithstanding, it is a fact that the command theory and the definition model by ‘objectifying’ rules attempt – even if in vain – to capture an essential aspect of normativity, that of certainty/objectivity, as deriving from the reducing properties which can be captured in indisputable definitions and criteria. As a result, any attempt to replace the command theory and the definition model is required to offer in their place a better alternative which would be equally capable of accounting for certainty and objectivity. Contrary to that Hart offers a *projectivist explication*⁶ of rules’ evaluative component, one that leads him to reduce the internal aspect of rules to the addressees’ internal subjective states (attitudes). Furthermore this reduction forces him

Clarendon Press, 1996), 52-82.

4 The term comes from N. Stavropoulos, *Objectivity in Law*, 2-5, 15-51. As he mentions the *criterial model* is: ‘not any particular philosopher’s theory, but rather a set of semantic views that figure in many philosophers’ understanding of language’, *Objectivity*, 2. In particular he associates it with views ranging from Locke to Carnap and the later Wittgenstein.

5 Stavropoulos, *Objectivity*, 53.

6 Vide Stavropoulos, *Objectivity*, 55-61.

to pursue normativity by severely compromising his critique of the definition model. On the one hand he upholds the definition model in those cases that seem to be *easy*, or the cases that do not require any recasting of the criteria accepted hitherto by the legal community. On the other hand whenever these criteria are defeated by new circumstances (*hard cases*) rules become indeterminate, in other words, lose their regulatory force and their meaning is left to the discretion of the judges. Thus normativity is constructed not as something internal to the rule but as something which depends on the contingency of external circumstances. The latter decide where the authority of rules starts and stops.

In contrast to Hart's solution I am going to argue in this chapter that an anti-reductionist account of the evaluative aspect of rules can by no means be restricted to the addressees' attitudes. On the contrary it requires an understanding of normativity as incorporating an objective dimension. This objective dimension is capable of delivering a non-reductionist account of rules in which the normativity of rules cannot be reduced to more basic co-extensive components. At the same time this account is able to escape indeterminacy because it locates normativity as internal to rules; rules, it will be argued, incorporate an evaluative point and new circumstances either fall under that point or they don't. Under this account the semantic depth of concepts will depend upon the rule's point. As a result there is no *a priori* fixed set of criteria for a concept's content. Semantic criteria are held together by the rule's point. Therefore criteria are amenable to revision according to new circumstances as long as they lie within the scope of the rule. New circumstances/empirical facts do not defeat rules. They either present a case for revision of the semantic field of the rule, if they fall under its point, or they are simply irrelevant, if they do not fall under its evaluative scope⁷.

In alluding to the objectivity of rules' evaluative dimension the chapter will conclude by pointing to the need for a fool-blooded anti-reductionist account of normativity. This will be the topic of the second part of the thesis: in it I will be argue that the irreducibility of normative concepts requires some sort of commitment to the existence of certain normative objects, properties and facts which figure as self-standing or *ontologically basic* in any account of normativity. This commitment to the existence of normative objects and facts will be sharply contrasted from some naïve belief in the physical existence of normative entities; instead *normative objecthood* will be explicated as the commitment to *abstract*

⁷ These views have been previously defended in different contexts; for the most comprehensive defence in the area of law see Stavropoulos, *Objectivity*, CHs II, III, V;

normative objects and facts which are intelligible within the inferential structures of our normative discourses.

THE INTERNAL ASPECT OF RULES

Austin and classical positivism

Presumably the greatest worry of the early positivists (Bentham, Austin) was to escape the fallacies of platonic or metaphysical ontology in the realm of norms which, in the form of natural law theories, was confusing the question of what *the law is* with that of what the *law ought to be*. In the spirit of those theories positive law is grounded upon ideal law which somehow exists independently of what happens in the world. Hence what the law is depends always on what the law in its ideal form is. The slack between the two dimensions of ought, real and ideal, amounts to the rejection of the first in favour of the second, any time there is a divergence between them. But, the objection of the positivists goes, this is a very confusing criterion since it is almost impossible to have any proof of, let alone to achieve an agreement about, what the law in its ideal dimension is. This difficulty amounts as a result to a total confusion about what the law is, at least as long as this last question is made dependent exclusively upon the first (i.e. what the law ideally is).

The only way out of this maze, according to the positivist critique, is to establish a more or less objective ground for the existence of legal rules, a ground that would present itself as an indisputable objective fact whose existence anyone could agree upon. Austin's *command theory of rules* is the most successful example of this reasoning, which mainly tries to reconstruct jurisprudence as an empirical science on the archetype of the hard sciences. Thus, in the command theory a rule exists whenever there is a habit of obedience towards the sovereign's command which in its turn is backed by a sanction. In this picture there are four necessary and sufficient elements which are postulated for the existence of a rule: a habit, a command, a sovereign who issues commands and a sanction which backs the command. Hence any statement about the existence of a rule is transformed into an empirical statement about the existence of these four requirements. Provided that these four requirements obtain, the existence of a rule follows without any need to resort to any dubious, occult metaphysical entities. In this way the eminent *utilitarian distinction*⁸ between 'is' and

⁸ Vide A. Takis, 'The Internal and the External' (unpublished master's dissertation, Brussels 1993), 30.

'ought', is preserved and with it the confidence that, in Austin's own words,

the existence of law is one thing; its merit or demerit is another.
Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry⁹.

Clearly the positivist distinction between what the law is and what it ought to be owes its intellectual power to Humean moral philosophy¹⁰. According to Hume it is impossible to derive a 'ought-statement' from an 'is-statement'. This is the case because our faculty of reasoning can only operate upon given premisses which, for Hume, are essentially empirical and hence available to our sensual perception. Along this line of argument, practical reasons, to the extent that they are not available to perception, play a secondary role and rely upon the evidence which is given through our various sense perceptions, while at the same time they cannot be founded on perception. If, for instance, I endorse the norm 'every time I buy something I undertake the obligation to pay the corresponding amount of money' as a valid reason for action, then in the concrete case that I buy a new tie at Jenners in Edinburgh, the moment the saleswoman hands me over my new tie, I ought to pass her the required amount of money. The ought-statement 'I ought to hand her the right amount of money' derives here, when the state of affairs 'the salesperson just passed me the purchased good', is subsumed under the general norm 'I ought to pay the price of every good I purchase'¹¹. Whereas the rationality of the subsumption is apparent, the foundation of the ultimate normative premiss, non-empirical as it is, cannot be demonstrated rationally. For Hume, in other words, rational is merely what lies in the realm of the empirical and therefore is verifiable through our senses¹². Practical ought-statements, on the contrary, seem to resist any uniform criterion of verifiability through the senses and therefore their power rests upon the existence of sentiments and emotions. What safeguards in Hume, as a result, the distinction between 'is' and 'ought' is our inability to have empirical knowledge of normative premisses. Conversely, normative premisses owe their power, non-empirical as they are, not to reason, but to passions (sentiments, dispositions, etc.). Along these lines,

9 Vide John Austin, *The Province of Jurisprudence Determined*, edited by W. E. Rumble (Cambridge: Cambridge University Press, 1995), 157.

10 The brief outline of the Humean philosophy that follows derives from MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 2-4.

11 For a detailed account of deductive reasoning, vide MacCormick, *Legal Reasoning*, Ch. II.

12 This seems to be the idea that is-statements correspond to sense data which relate to objective, indisputable external objects, whereas ought-statements can never be objective because they depict internal, and insofar subjective, emotional states.

when one enquires about the force of a normative ought-statement, one is looking to a sentimental or emotional ground which motivates an agent to act accordingly. Reason, therefore, can never move agents to act; it is, in Hume's famous words, 'the slave of passions'¹³.

Under the weight of this philosophical tradition it is not very surprising that British positivism located the reason for obeying law and the notion of legal duty in the 'kingdom of passions'. But attempts like the command theory of law manifest also the concern to find a compensation for this inevitable subordination of reason to passions: if the binding force of law must, in the last instance lie within passions, it may still be possible to identify, on another level, some indisputable elements which are empirical, ergo rational, and constitute an important (external as it were) aspect of law's binding force. Of course neither Austin nor any of the other early positivists ever expressed themselves in these terms, but one could, I believe, legitimately project this line of argument upon their thinking. On these considerations the existence of a rule is vindicated through the observance of a sovereign, a command issued by him which is backed by a sanction and the habitual obedience thereof. Accordingly, it may be indeed the case that, at the end of the day, 'the binding virtue of a law lies in the sanction annexed to it'¹⁴; that in other words a law motivates agents because they want to avoid the infliction of pain (sanction) upon them. At the same time, however, it is also true that the existence of the sanction can be asserted in an objective way. Put in a more Hartian terminology, a rule motivates agents internally on an irrational basis (dispositions, emotions) which can be rationally accounted for, externally, as the factual existence of a sanction. But if this exchange of the internal with the external is possible, one need not after all worry about irrational internal psychological states of affairs, one should just concentrate on their external correlates, i.e. sanctions, in order to account for rules' binding force.

Hart's reductionist dilemma

Roughly speaking, Hart's attempt to avoid the reductionist move of positivism can be depicted along the following lines: he dismisses the irrationality of the internal and its concomitant reduction to something empirical, by introducing an evaluative aspect of rules. Hart believes that the following of a (social) rule is something rational which encompasses two aspects: an external, empirical, factual aspect; and an internal, rational, evaluative as-

13 Vide, MacCormick, *ibid.* 3.

14 J. Austin, *The Province of Jurisprudence Determined*, 151.

pect; these two aspects are not reducible to each other and, taken together, they constitute the necessary and sufficient conditions for the existence of a rule. In this way he believes to rescue the utilitarian distinction between ‘Is’ and ‘Ought’ while avoiding reductionism.

Be that as it may, his construction of the internal aspect does not do justice to his endeavour. Hart maintains that it is the reflective attitude which actually constitutes the evaluative aspect of rules rather than merely providing access to it. By taking that step, however, he ends up identifying the evaluative aspect of rules with the internal subjective states (attitudes) of the addressees. Rules on this view are prevented from possessing an objective evaluative dimension and instead are taken to depend upon the addressees’ actual sharing of the same subjective attitude. Insofar the evaluative aspect of rules (or their normativity) is reduced to the projection of ‘subjective’ attitudes onto value-free objects (rules)¹⁵. By professing this view, however, Hart undermines his important initial intuition, namely that normativity cannot be captured in empirical value-free terms.

The critical reflective attitude, as the pivotal element of the internal aspect of rules, cannot escape Humeanism as it is taken to point towards the subjective attitudes of the rules’ claimants which are projected upon the external aspect of rules. Hart understands that normativity must emanate from the internal point of view but he is not able to discover there anything more than subjective attitudes, because he searches with a Humean compass. But soon he has to face the fact that critical attitudes are as much subjective, in fact *idiolectic*¹⁶, as emotions and preferences. This poses for Hart the following *reductionist dilemma*: either he has to agree with Austin and decree the External as the bearer of normativity; or he has to reduce normativity to internal subjective attitudes. Either way Hart’s initial anti-reductionist move fails and rule-scepticism ensues.

Commentators sympathetic to Hart’s theory, in an effort to avoid the reductionist dilemma, have introduced, alongside the internal and the external aspect, a new, third aspect, commonly referred to as *the hermeneutic or detached point of view*¹⁷. For the moment I will postpone the discussion of this concept until the fifth section of this chapter and give only a brief outline of its rationale. By introducing the hermeneutic point of view these authors try to reintroduce the lost premiss of Hart’s argument: the objective dimension of rules’ normativity. The hermeneutic point of view is taken to represent a rational cognitive

15 Vide Stavropoulos, *Objectivity*, 55-61.

16 The term is used in connection to Wittgenstein’s idea of a *private language*; for a further exploration of the content of this idea vide Ch VI, *infra*.

17 The terms belong respectively to N. MacCormick and J. Raz. Vide Stavropoulos, *Objectivity*, 55-

aspect of rules which ranges over subjective attitudes, while it can not be reduced to the external aspect. This endeavour will be interpreted as a first attempt to rest a case for the existence of an evaluative point which resides within the rule and enjoys an objective status; objective as opposed to being dependant upon the claimant's subjective attitudes and dispositions. However, I am going to argue that contrary to the intentions of its authors the suggested 'third' point, which occupies a position between the external (or the extreme external) and the internal point of view, is already qualified for undermining the original Hartian distinction: if, namely, rules' normativity and meaning is a cognitive or even perhaps a factive issue that one can account for without using subjective attitudes or reducing normative phenomena, then the Internal – External distinction starts to loose its *raison d' être*.

HABITS AND RULES

The *internal aspect* is employed by Hart in order to corroborate the distinction between habits and social rules¹⁸. Habits account for a generalised convergence of behaviour; yet this convergence does not establish habits as standards of behaviour that offer a good reason to abide by them. Conversely, rules generate reasons for action and operate as standards which offer grounds for criticism whenever cases of deviation arise. As a result, rules, contrary to sheer habits, disseminate reasoned, as opposed to contingent, convergence amongst the members of a group. Rules, in other words, are general standards which are to be followed by the members of a group. The internal aspect is precisely the warranty of the 'general standard' character of rules on behalf of the members of a group. In this way the differentiation between rules and mere habits lies in the general standard character of the former which, nevertheless, depends upon the addressees' endorsement. Hart famously speaks about a *critical reflective attitude* which validates a pattern of behaviour as a general standard. Against the background of the critical attitude this standard is embedded in acts of criticism or demands for conformity plus the further belief that such criticism and demands are *justified*. All these functions of the internal aspect find their characteristic expression in the normative terminology of 'ought', 'must', 'should', 'right', 'wrong'.

When the members of a small church community urge the newly arrived foreigner to remove his hat upon the occasion of entering their church, they do so with the conviction that there is a rule prescribing that all male adults have to be uncovered in the church. Con-

61. For further discussion see this chapter, *infra*.

18 The discussion of Hart's concept of rules draws upon H. L. A. Hart, *Concept*, 55-58; 82-91; 100-

versely Sunday afternoon theatre goers do not demonstrate any attitude of commitment towards their pattern of behaviour even if this pattern happens to be a generalised habit amongst the inhabitants of a little provincial town.

Be that as it may, one feels the need to ask how much better does the reflective attitude account for normativity than the discredited psychological states, dispositions and emotions? Or, put in different terms, are critical reflective attitudes less subjective than emotions and other 'private' internal psychological states? Hart definitely wants to demarcate the domain of reflective attitudes by drawing a line between them and other psychological states. In an account of obligation¹⁹ he emphasises that the main difference between being obliged and having a genuine obligation is that in the first case our statement refers to psychological facts like beliefs and motives, whereas in the second case those facts are not enough, in fact they are irrelevant and come analytically too late to be able to account for obligation. Hart adds that even if one, like Austin, replaces internal psychological states with the likelihood or the prediction of the possibility of suffering an 'evil', one still would miss the point of what an obligation consists in. Bribing authorities or circumventing enforcement of the law by any other means does not void one's obligation, though it might very well help one avoid punishment, defeating thus the prediction of punishment. Legal obligation is about offering reasons for the performance of some conduct and goes beyond the actual enforcement of this conduct:

...where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions²⁰.

Of course Hart, rushing to anticipate any efficacy-based criticism, concedes that in any case a certain amount of social demand for conformity is required for the existence of legal obligation. Distinct from morality as it is, a legal system must be backed by the general demand for conformity and a sufficient amount of serious social pressure brought to bear upon those who deviate²¹. Only under this requirement can legal rules give rise to obligations. However, notwithstanding the importance of 'serious social pressure', the fact that rules of obligation are supported by serious social pressure does not entail that to have an obligation is

117; and 200-212.

19 Vide Hart, *Concept*, 82 n.

20 Ibid. 84.

to experience feelings of compulsion or pressure²². Hart makes use of the internal and the external point of view anew – this time it is the point of view of someone who makes statements *about* a legal system – in an effort to debunk the insufficiency of a predictive account of rules. Thus *external statements* are statements which reproduce the legal phenomenon as a series of regularities of behaviour that are connected, in a casual relation, to sanctions that occur whenever behaviour deviates from the regular pattern. What the external observer can offer, at best, is an account in terms of observable regularities of conduct, predictions, probabilities and signs but not an account *in terms of rules*. For this he would need to take the internal (to the rules) point of view, i.e. the point of view of the members of the group who accept the rules as general standards of behaviour. This internal point could be adopted without necessarily presupposing membership of the relevant social group, e.g. the hat removers of our little provincial parish. One could retain the external point while sharing or trying to understand the content of the reflective attitude of the members of a group. This *non-extreme*, as opposed to the pure, extreme external point, would give an account of the normative phenomenon in terms of rules²³.

The meaning of normative statements

Ingenious and elegant as it may be, Hart's external-internal distinction is not as safe or clear a criterion, as he had probably thought. Hart, in his account of rules, seems to use two very different notions of the internal point of view interchangeably. On some occasions, the decisive criterion for the differentiation internal-external derives from the physical as it were positioning or placement of the one who makes statements about a rule in relation to that rule or a system of rules, i.e. one's being or not under the authority of that rule. On other occasions it is implied that what is important is not the actual position of the one who makes the statement but one's participation-in and sharing-of the critical reflective attitude that elevates a pattern of behaviour to the level of a rule. Now this could, in turn, mean two things: either that attitudes are something distinct and additional to the position of the utterer, in which case, one must be able to share what is in the minds (i.e. the attitudes) of those who accept the rule as a rule²⁴; or that each rule 'corresponds' to or incorporates only one content which resides not in the head of those who abide by the rule but in the rule it-

21 Ibid. 86.

22 Ibid. 88.

23 Vide *Concept*, 89-90.

24 One could add here the problematic assumption that those who accept the rule/s as a standard in-

self²⁵ (and therefore does not consist in any particular person's attitude; hence attitudes are not a safe criterion). Hart is not clear as to which version of the internal point of view is authoritative in matters of normativity and meaning of rules. On a first estimation it would seem that the second meaning of the internal, i.e. the 'position-detached' version, would be more consistent with the Hartian anti-reductionist program. Given the fact, besides, of the extreme implausibility of having any intuitive knowledge into others' internal attitudes, the detached version would come as further incorporating the belief about an independent content within the rule. Surprising as it may be, Hart's concern not to identify law as 'it is' with law as it 'ought to be' is so fundamental that he does not hesitate to jeopardise his anti-reductionist project.²⁶ As a result, his account of rules seems to steer between the version of the internal aspect as a locus-attached criterion and its version as consisting of subjective attitudes. Hart hardly considers the third possibility of an independent content of rules as he takes it to lead to an obscure Platonism.

ATTITUDES AND THE INTERNAL – EXTERNAL DISTINCTION

The whole discussion up to this point indicates that Hart is particularly keen on connecting the meaning of normative utterances with their pragmatic or contextual conditions of per-

deed share already the same reflective attitude.

25 Beyond doubt, even in this case, what is 'in the rule' can be known only via the addressees' minds. The case, though, of minds trying to grasp the single content of a rule, and the case, almost Procrustean, of a rule being forced to accommodate the contents of all minds, are two fundamental different approaches. In the second case, even if the impossible ability to have access into others' minds was granted, we would probably end up with something like a non-rule because it would accommodate almost every possible course of action. To picture this situation recall Berkeley's discussion of the idea of a triangle that would contain all actual triangles. This, he concludes, would not be the idea of any triangle at all; vide Blackburn, *Spreading the World* (Oxford: Clarendon Press, 1984), 46-47.

26 I am inclined to believe that Hart's picture of the mind-world relations is rather dualistic. Thinking in these terms can certainly complicate things a lot, for one takes everything that belongs to the world to be somehow material and external to the mind. And if one, like Hart, does not want to accept normative entities while at the same time wants to save normativity from subjectivity and scepticism, then one is not left with many choices: one needs to admit that normativity and the meaning of rules derive from inner mental processes (attitudes, definitions, criteria) which validate external structures, i.e. patterns of behaviour, habits, words, statutes, etc., as rules. However the fact that internal mental processes are highly indeterminate will, sooner or later, lead anew either to scepticism or to reductionism, with the initial tension reviving in its full size. Conversely something akin to a so-called contextualist understanding of the mind-world relations has the advantage of making mental contents accessible *qua* world. In such a picture normative concepts are shaped through social practices and therefore have a determinate content which is cognitively accessible. At the same time world-phenomena are never detached and value-free because they are constantly mediated through mental processes. The demanding part in this model is that one has to presuppose some 'categories of reason' which generate a synthesis of all that is happening around us into a meaningful whole; those categories will probably need to be understood as enjoying a *transcendental status*. For a detailed account of this line of argu-

formance. It is in this context that he constantly links up normativity to the position that rules' claimants occupy within a legal system (force of utterances) or in relation to a legal system (external-internal distinction). Hence, the connection of the internal (or evaluative) aspect of rules to the performance of the legal sentences or, as he usually calls it, to their 'force' features throughout Hart's account²⁷. In fact 'force' considerations, which dominate Hart's earlier work, gradually are incorporated into the reasoning about the internal point of view and for this reason I am going to use both terms interchangeably.

Obviously, the employment of the force of normative statements stems from Hart's annoyance with theories that were analysing rules' meaning in terms of closed set of semantic criteria and/or identifying rules as 'queer' metaphysical objects. In locating the meaning of rules into the conditions of the performance of normative statements about the law, he purports to show that their meaning is not anything static or frozen or corresponding to any pre-given entities; the meaning of rules has, rather, a dynamic character by being, as it were, context-sensitive. Though the motive behind this strategy is justified, the strategy itself ends up facing a series of problems, the most prominent being that by making rules' content dependent upon the contingency of the context, one loses any notion of semantic content and, worse, any notion of rules.

Hart offers a picture in which attitudes stand for the evaluative aspect of rules and are further analysed in terms of the positioning of the utterer in relation to a legal system. Accordingly, the meaning of an internal statement seems to amount to the position that its utterer occupies²⁸. Hence, the attitude which validates something as a 'general standard' depends upon the positioning (internal-external) of the one who holds the attitude. But, presumably, attitudes were initially appealed to in order to explain what the internal point of view consists in. Now they come to depend on the 'locus of uttering'. Hart does not make enough effort to avoid the criticism of circularity. This circularity, though, seems to be the only possible/consistent outcome of a Humean-based account of normativity. As already argued, Hart's Humean compass does not allow anything but subjective psychological states

ment, vide CHs V and VI, *infra*.

27 Vide Stavropoulos, *Objectivity*, 55.

28 The position of the utterer is important even within a legal system: Hart ascribes different value and importance to a statement made by a judge than he does to the one uttered by the layman. Generally Hart seems to connect a claim for lack of truth-values of legal statements with the fact of their dependence upon the utterer's positioning. In this way internal statements do not have truth values but are constitutive to the meaning of rules. Connectedly within a legal system statements bear no truth values but merely draw their validity from the utterer's positioning in the system. Vide for a more detailed analysis Stavropoulos, *Objectivity*, 55-58.

to feature as bearers of normativity. If, nevertheless, one is dissatisfied with such an account and wants to report some amount of normative objectivity (in the minimal sense of uniformity of regulation for future cases), one is bound, as Hart does, to seek refuge in some external features of norms. But in doing this one ends up endorsing a version of Austin's command theory with all the serious problems pertaining to reductionism.

Once more the dilemma features in its full-blooded version: what can better account for normativity? A reduction to external casual regularities or a reduction to internal subjective psychological affairs, i.e. critical attitudes? The answer is probably 'neither'. But why allow the dilemma to emerge in the first place? Why consider at all the first horn of the dilemma as a promising candidate, since, in the first place, the whole point of the critique to Austin's conception of normativity was precisely to debunk his 'external' reductionism as flawed. The answer, though not very complicated, is not straightforward within the Hartian frame of mind: One is bound to be infinitely entangled within the dilemma as long as one is not decided to construct the evaluative aspect of rules on a different basis. Namely, not by using subjective attitudes as the cement of one's account but by trying to account for the objective dimension of norms²⁹ and, therefore, by looking for something which is beyond subjective psychological affairs while, at the same time, still internal to rules as opposed to something that is connected with external regularities. In doing this, one will very soon realise that the distinction Internal-External loses its importance in an account of normativity. This is because one needs to hold on to the External only as long as one cannot completely rely upon an Internal that is based upon subjective attitudes. And vice-versa, one cannot do without the Internal as long as the External cannot account for the evaluative aspect of normativity which seems, anyway, to be ubiquitous and beyond dispute.

Overlooking the real cause of the dilemma, as in the case of Hart, can lead to the familiar shortcomings in an account of normativity. As long as he shares the premisses that produce the dilemma, Hart needs both the Internal and the External. Normativity becomes for him a concept which heavily relies upon the context of uttering normative statements (the Internal) while at the same time it cannot be sufficiently grounded without any reference to the external regularities of habitual obedience (External). But, and this is probably the main flaw of the whole project, as long as one inevitably has to shift to the External in order to compensate for the Internal's insufficiency (context dependence), one loses the

29 At this point it is enough to consider objectivity of norms as an analytical feature of abstract standards (i.e. norms) which aim to regulate in a uniform way future cases.

most valuable element of normativity which was the (internal) evaluative aspect of rules. The previously raised reproach of circularity is, therefore, just one of the shortcomings of Hart's account. In fact it points to a deeper and more pivotal shortcoming, namely the context-dependent explication of the meaning of normative statements. It is a shortcoming of the sort that threatens to undermine any notion of normativity. The circular definition of the internal point of view through attitudes and vice-versa, does not disclose any additional element that attitudes possess, by whose virtue normativity is illuminated. But beyond its uninformative character this circularity denotes the more grave fallacy of the Hartian construction: attitudes cannot be anything more than internal psychological states because they are meant to stand for the pragmatic conditions of the uttering of normative statements.

What Hart would have needed, instead, in order to uphold his External-Internal distinction, would be attitudes consisting in something *independent* and *prior* to the distinction Internal/External. Attitudes, that is, should be able to offer reasons for distinguishing an internal from an external statement, hence, normativity from description. But Hart's account of the content of critical attitudes does not seem to allow any space for such a corrective interpretation. The reason lies in the way content is specified: *it is a feeling of commitment towards a rule*³⁰. It is the commitment of the one who makes a statement about a rule, that this rule is a required general standard of behaviour. Is it ever possible to understand commitment as offering an independent criterion for the internal/external distinction? Could, in other words, an external observer adopt or 'simulate' the internal attitude, hence the commitment, in order to give an account of '...the way in which [a group of people] are concerned with [rules] from the internal point of view'³¹? Strangely enough Hart's answer is both 'yes' and 'no'! According to Hart, it is possible to give an external account of the way others view rules in the internal aspect, but not by sharing their commitment. Since commitment is the specific *differentia* of rules (from habits), it is by definition impossible to grant the external point of view any access to it. But at the same time Hart seems pretty confident that it is possible to externally refer to rules as they are viewed internally³². Apparently the acceptance of these two mutually exclusive answers shows Hart's discomfort with his own construction of the internal aspect of rules. If one considers the negative answer as being more authoritative on the issue, then Hart's picture of rules and normativity

30 In introducing commitment as the main component of critical attitudes I endorse N. MacCormick's clarification of the internal aspect of rules in his *H.L.A. Hart* (London: Arnold, 1981), 30-40. Vide also the next section of this chapter.

31 Cf. Hart, *Concept*, 89.

has a very restricted, almost trivial, scope which threatens to turn rules' meaning into a subjective business. If, on the other hand, one takes the positive answer as a guideline then there is only one conclusion to be drawn: namely that there must be something else which differentiates rules and which is more fundamental and, therefore, independent of attitudes. Hence Hart's construction of the Internal and his account of rules' meaning is at best irrelevant.

Semantic content and force

It seems that there are more reasons speaking against Hart's picture of rules. His assimilation of the semantic content of normative statements to the conditions of their performance cannot really be assumed without any problems. Its most important shortcoming is, probably, its failure to guarantee certainty in communication³³. If every time that the position of the utterer changes, the meaning of the statement changes as well, then normativity would be unintelligible. This is, though, far from the case. People reason by using rules of a system irrespective of their positioning *vis-à-vis* that system: so does the professor of Roman Law in giving examples to his students, or the Comparative Law lecturer in her tutorials. But even within the same legal system the performative force which is connected to a judge's utterance does not entail any privileged access to the truth about the real meaning of the statute than, say, the statement of the plaintiff's lawyer. All these modes of engagement in normative reasoning make a rather strong case for the assumption that force considerations fail to occupy a central position in the determination of the meaning of normative concepts. Admittedly, Hart's initial, justified concern was to discredit the view about the existence of closed sets of semantic criteria and analytic definitions for the application of legal concepts³⁴. Still the importance he ascribed to pragmatic or 'force' considerations is clearly overrated. Instead, pragmatic conditions seem to be peripheral to the determination of meaning of legal/normative concepts. These concepts seem to retain a stable meaning irrespective of the context of their fulfilment³⁵, a fact that points to the existence of some sort of

32 Op. cit.

33 Vide Takis, 'The Internal', 34-38.

34 See the next section on Hart's open-texture considerations.

35 That is, the pragmatic conditions which feature in Hart's account and not any kind of pragmatic conditions whatsoever. As I am going to argue in the last two chapters, there seems to be another level of pragmatics which constitutes something like the (universal) context of all contexts of communication. Under this term I attempt to capture the normative requirements of every form of human communication which are pragmatic to the extent that they are practical or action-related, as opposed to being ephemeral (as Hart's utterer's positioning is).

genuine properties which determine the conditions of correct application of legal concepts prior to the 'locus criterion' of the Internal-External distinction. Conversely, any attendance to the priority of the pragmatic conditions for the meaning of normative concepts, as Stavropoulos observes, will only lead to emotivism and its concomitant problems³⁶. An emotivist who rejects the existence of genuine properties and conditions for the application of concepts would have to concede that only applications of a legal concept which emanate from the competent user (e.g. the judge) are correct. Such a concession entails: first, that all applications of other claimants are wrong; second, that all applications of the competent users are correct. Both entailments clearly fail under the light of the possibility of determining correct applications of concepts according to properties that transcend the contextual conditions of performance.

In all, these cases show that the content of a normative statement is to a certain degree detached from the conditions of its performance and the performer's feelings of commitment. The position/role of the utterer and the pragmatic conditions of the uttering are not sufficient enough a criterion for the meaning of a normative statement³⁷. As a result, it must be the case that whatever gives a normative statement its normative meaning, it is more than the positioning of its claimant or the pragmatic, ephemeral conditions of its uttering. A first attempt to meet these objections to the Hartian conception of rules, without discarding the external-internal distinction, is to be found in Neil MacCormick's suggestion for a third non-extreme external point of view besides the external and the internal, which he labels *the hermeneutic point of view*. In endorsing this view MacCormick claims merely to exploit Hart's concern that no account 'in terms of rules' is possible from an 'extreme external' point of view³⁸. What is very interesting in his account is the suggestion of a cognitive element within critical reflective attitudes which transcends the external-internal distinction and is able to account for semantic determinacy (or objectivity) of rules' meaning, irrespective of the contextual contingencies of their uttering or the utterer's positioning. This having been said, MacCormick does not think that the cognitive layer suffices in accounting for rule's normative power which has in any case to be related to some sort of volitional layer (commitment). As a result he constructs the hermeneutic point of view as being parasitic to the Hartian internal point of view with all the problems of psychologism attending to this

36 Vide Stavropoulos, *Objectivity*, 56.

37 The ephemeral character of pragmatics does not apply to all levels of communication. It will be later claimed that there is a sort of universal pragmatics which underlie all human communication and, hence, determine meaning; cf. also with footnote 35, *supra*.

move. This problem notwithstanding, I will suggest that MacCormick's valuable intuition about the cognitive dimension of rules can be rescued if disconnected from the Hartian conception of the internal aspect of rules. Then it can be recast in suggesting that it is possible to acquire knowledge of the evaluative aspect of some rule independently of the internal psychological states of those that the rule addresses.

THE HERMENEUTIC POINT OF VIEW: RULES' COGNITIVE ASPECT

The vegetarian who criticises others for eating meat surely does not do so with the belief that he is following a general social standard that condemns carnivorousness. But even within the realm of something like the corpus of rules of vegetarianism, one does not need to feel committed to any of those rules in order to be able to appreciate their point and, say, warn his vegetarian friend against eating a non-vegetarian dish. In those cases normative uses of the words 'ought', 'should', 'should not', etc. cannot coherently be explained against the canvas of the distinction external-internal. The required commitment of the Hartian internal point is either missing, as in the second case, or it is a commitment to a subjective standard, as in the first case. Such cases seem, as a result, to point towards a third, as it were, 'detached' point of view which incorporates a *cognitive aspect of rules*. This aspect, argues MacCormick, refers to rules as patterns of behaviour and ranges beyond the external-internal distinction³⁹. It is the capacity to appraise a course of action or of state of affairs against the background of a pattern of behaviour and to register instances of conforming to or not conforming to it⁴⁰. This aspect is juxtaposed to the volitional aspect of a rule which consists in some wish or preference that the relevant pattern prevails as a general standard of behaviour. Whereas the volitional layer presupposes the internal point of view, the cognitive layer has a broader scope: it refers to the intelligibility of rules as patterns of behaviour beyond one's commitment to them. This distinction, it is submitted, enables one to accommodate the phenomena of detached statements like the non-vegetarian's warning to his vegetarian friend.

MacCormick construes in this fashion a third, 'hermeneutic', point of view which is capable of re-constructing the normative assumptions of the internal, the normative *par excellence*, point of view. For one to occupy the hermeneutic point of view what is required is a full sharing of a rule's cognitive layer plus the full appreciation, but not sharing, of the

38 Vide Hart, *The Concept*, 89-90; MacCormick, *Hart*, 33, 37.

39 Vide also MacCormick, *Hart*, 31-32.

same rule's volitional element⁴¹. Thus, statements from the hermeneutic point of view admit of truth-values independently of the utterer's commitment. With this move MacCormick intends to rescue the distinction between Is and Ought. The hermeneutic point of view offers, namely, 'an account in terms of rules' which is, however, distinct from the internal point of view. It is an external account ('Is'-account) only not as external (contains an evaluative aspect) as to succumb to a blatant reductionism (or a full loss of normative meaning). If this were to be true then Hart's aim for a descriptive non-reductionist jurisprudence would be justified.

Unfortunately there is a sort of inconsistency lurking within the very conception of the hermeneutic point of view. The inconsistency lies in the combination of the cognitive and the volitional layers. In what follows I will abide by the suggestion⁴² that once the cognitive layer has been ascertained there is no need to supplement it with any volitional level. If, nevertheless, one does so then one ends up with the familiar problems of projectivism pertaining to Hart's internal point of view. Alongside these two options there seems to be only one left: the extreme external point of view or the lack of both cognitive and volitional elements which amounts to nothing less than the loss of any notion of meaning and normativity.

In order to appreciate the problematic character of the combination of the two elements, the cognitive and the volitional, within the hermeneutic point of view, we have to attend closer to the way they interrelate. If the point of MacCormick's construction is that the volitional element is what makes rules what they are, then the only purpose that the cognitive layer serves is to declare that there is a way for someone, from an external point of view, to re-construct or re-present the commitment of those who are internally related to that rule, without one's necessarily sharing that commitment. But if this is the idea behind it then the hermeneutic point does not really escape the problem of projectivism which was ascribed to critical attitudes⁴³. As long as commitment features as the point of reference for the cognitive layer, it is not important for the criticism that the hermeneutic points requires just an appreciation and not a full commitment. Besides there is always the problem of acquiring knowledge of the mental states of others, a fact that in effect makes it even more difficult to talk about a common or uniform commitment within the internal point of view.

40 Vide *ibid.* 33.

41 *Ibid.* 38.

42 Vide Stavropoulos, *Objectivity*, 58-61.

43 *Ibid.*

If, on the other hand, MacCormick means that the cognitive aspect is independent and prior to the volitional element then what is really the point of adding a volitional element? In MacCormick's case it could be explained from a strong Humean influence about the role of sentiments in practical reason, but otherwise the featuring of the volitional level cannot successfully survive scrutiny.

The Humean background of MacCormick's proposal left aside, the cognitive layer of the hermeneutic point seems to incorporate a claim that actually renders the volitional supplement futile, not to say detrimental. Stavropoulos⁴⁴ successfully argues that grasping the content of a pattern of behaviour comes *analytically prior* to any preference about following it, hence preferences do not make any difference as to the content of rules. If indeed patterns of behaviour are the starting point, as MacCormick seems to argue, then it can not be preferences that turn them into rules because knowledge of a pattern implies already knowledge of the relevant rule, hence preferences about its following or not cannot interfere with the rule's content. In other words one should already know the rule in order to direct one's preference for following or not following it.

Take the example of cars stopping at red lights and consider two scenarios⁴⁵. In the first scenario traffic lights are part of a broader practice (involving vehicles, pedestrians, etc.) aiming to regulate traffic on the streets. In this scenario the upgrading of the traffic-lights practice to a rule is already performed through the knowledge of the (broader) practice. Such knowledge confers to the traffic-light practice already a point which is all that matters for the existence of a rule. Commitment or any preference about following that point does not alter the point's (the rule's) content.

On the second scenario traffic is generally regulated by other means (roundabouts, traffic policemen, etc.) and the existing traffic lights are not directly involved in its regulation. Again here the volitional layer does not add anything to the existence of a rule. If, in this case, a rule exists already then it exists by virtue of a different point conferred by another practice (e.g. the practice to abide by the Sovereign's commands⁴⁶). It is the knowledge of that practice that generates the rule and not any additional preference about the rule's following. But if attitudes are irrelevant to the content of a rule why not suppose that they are also irrelevant to a rule's evaluative aspect? Conversely, if the object of the cogni-

44 Ibid. 58.

45 The example comes from Stavropoulos, *ibid.* 59.

46 As Stavropoulos comments, the command of the sovereign, despite expressing a volition, is in the second scenario part of the point of a rule and not a preference about its following; *vide ibid.* 60.

tive aspect of rules are not attitudes but patterns one might well be tempted to suppose that the evaluative aspect of rules might also, after all, not lie in attitudes but in patterns of behaviour and practices; hence, that by the same token the evaluative aspect of rules and their components are accessible to knowledge.

These remarks corroborate the initial claim that rules have an evaluative aspect which allows their claimants to engage in normative discourse by criticising and justifying courses of action or inquiring about the right thing to do. To that extent the claim corresponds perfectly with Hart's intuition about the necessary existence of an evaluative aspect of rules. However, the discussion has tended to suggest that what Hart considered to represent rules' evaluative content, i.e. attitudes, does not do the work properly. On the other hand MacCormick's proposal for a cognitive aspect of rules, if disconnected from the volitional supplement, seems to resist successfully the criticism that was directed towards Hart's critical reflective attitudes. Moreover, there seem to be a series of reasons that suggest that the cognitive aspect is connected with the rules' evaluative aspect over patterns of behaviour and practices. It may, therefore, be well the case that the evaluative aspect of norms in general and legal norms in particular can be known by grasping the point that resides within certain practices or patterns of behaviour. But if the evaluative aspect of rules is a matter of knowledge detached from preferences then a lot has been won. Contrary to subjective attitudes, practices and their points are not in the heads and can be known in an objective way. Restating the evaluative aspect of rules as involving a cognitive dimension seems to avoid most problems emanating from the attitudinal conception which threatened with the collapse of semantics into pragmatics and the subsequent loss of meaning.

At the same time, a recasting of the evaluative aspect of rules in cognitive terms dovetails with an anti-reductionist account of legal rules and normative concepts, as Hart intended all along. Legal/normative vocabulary is indispensable, hence non-reducible, if and only if there are normative entities (objects and properties) to which we have cognitive access⁴⁷. If rules and normative properties exist then they cannot be eliminated through other more basic empirical properties or other entities, hence they are ontologically basic. Admittedly this won't rule out the possibility that normative entities may supervene upon physical properties or social facts and states of affairs⁴⁸; this possibility, however, cannot cancel the ontological autonomy of rules and evaluative properties as long as the level su-

47 For a more accurate formulation of the relation between the level of language and the level of objects/properties, see Ch II, first section, *infra*.

pervened upon is not sufficient without reference to those properties in accounting for them. But this is all one needs in order to argue that it is not possible to dispense with the use of evaluative concepts in our discourses concerning rules and evaluative properties⁴⁹.

In relation to the distinction between Is and Ought the appreciation of the cognitive bedrock of evaluative/normative concepts suggests a major restructuring. The sharp distinction between what the law is and what it ought to be cannot be sustained convincingly as long as the evaluative aspect is clearly an expression of the Ought. The collapse of the Is into the Ought is, in effect, the major consequence of recasting the evaluative element of normative concepts as being cognitively accessible. But that need not be a worrying effect. The mingle of Is with Ought is indeed problematic only as long as the main fear of positivism obtains. That is, as long as evaluations, normativity and the realm of ought *lato sensu* are located within attitudes, feelings and other subjective mental states. On the contrary, if the evaluative aspect of normativity is disconnected from the 'kingdom of passions' and further understood as constituting part of the (social) environment then the content of evaluations can be accessible to knowledge as any other worldly thing. It is, namely, positivism's warped conception about evaluation which forces one to stick to the Is-Ought distinction. Once shown that evaluation is of a different quality the distinction loses its rationale. Naturally, there are other problems that arise (like 'how is it possible to have objective knowledge of rules as we have of, say, tables and other objects?'; or 'if normative contents are about things belonging to the environment, how does our perceptive apparatus becomes aware of those things?'). The persistence of those new problems notwithstanding, I would like to suggest that some form of realist explication of normative properties and other normative 'objects' has the immense advantage of offering a genuine solution to Hart's query about a non-reductive jurisprudence, simply because it acknowledges that for something to be non-reducible to other basic-level properties it has to enjoy some sort of ontological independence.

On the other hand cognitivism about normative entities can generate the same degree of objectivity of knowledge as cognitivism concerning empirical entities does, without being committed to ascribing to normative entities the ontological status of the empirical ones (freedom does not need to be thought to have the same molecular structure as a glass,

48 For a more detailed discussion of the issue of supervenience, see Ch II.

49 This is the same with every evaluative concept. E.g. the fact that someone's brave behaviour supervenes upon a series of biological facts (high blood pressure, quick movements, etc.) does not imply that these physical facts can capture the evaluative level of that behaviour without using the concept of

in fact it not need have any molecular structure at all). The claim that values and other normative entities are part of the fabric of the world links up with the broader claim that matter is not the exclusive ingredient of the world, hence that physics cannot offer a complete picture of the world without resource to evaluative sciences⁵⁰. Besides, as far as the degree of objectivity of knowledge is concerned, empirical concepts seem to be on a par with evaluative concepts. Contemporary science, that is, seems to operate very similarly to moral science by employing complex substantive theories which care to specify points for grouping together components of concepts' content rather than adhering to the objectivity of the given. It is to this extent that the degree of objectivity is more or less the same for empirical and non-empirical concepts⁵¹.

Law's ontology and semantics

In all by alluding to the existence of a cognitive dimension the discussion of the hermeneutical point of view iterates the need for an account of law's ontology. This account will have to take seriously the possibility that there are evaluative (abstract) objects or facts such as rules and normative/legal properties⁵². For the moment I will postpone such an account for the next chapter and in the last section of this chapter I will discuss a slightly different issue which, however, will turn out to be of great importance for the ontological account of legal rules and legal properties. This is the issue of legal semantics, or of the meanings of legal expressions. The importance of legal meaning for an ontological account of norms rests on the fact that the evaluative aspect of legal rules and properties is conveyed through their meanings. To that degree an appropriate account of meaning seems to be necessary in guaranteeing that what is ontologically basic (rules, properties) is still evaluative. This is of particular importance for an anti-reductionist account of law: such an account is interested in establishing the ontological autonomy of *evaluative* entities as opposed to *non-evaluative* ones (i.e. those properties that reductionism takes to be the only basic-level entities in any ontological account). Connectedly I will argue that an anti-reductionist account of legal entities has to be a two-tier account: an account of the ontological independence of legal entities and an account of their evaluative content.

Under the proposed two-tier anti-reductionist account, ontology and semantics are

'bravery'. For a more extended discussion of supervenience refer to Ch II.

50 For a similar view, however without the broad implications adhered to here, see Fodor, 'Special Sciences (or: the Disunity of Science as a Working Hypothesis)' in *Synthese* 28 (1974) 97-115.

51 See the analysis of Stavropoulos in *Objectivity*, 69-82.

not two enterprises disconnected from each other. Rather ontology is taken to be exhaustively reported through semantics: normative entities are ontologically 'situated' according to the way they are depicted by sentences⁵³. In this picture the need for preserving the evaluative character of legal entities poses increased demands on the semantics employed; in other words not any semantics will do the job. One needs a semantics that not only satisfies the formal-structural requirement of identifying ontological categories within or via linguistic structures but, furthermore, a semantics that accounts for the evaluative meanings which linguistic structures convey in communication. Judged from the point of view of that requirement, Hartian semantics is not sufficient.

However justified Hart's critique of the semantic accounts of his predecessors may be, it fails to account for the evaluative element of legal meaning in an objective way; that is in a way that would avoid succumbing to the psychologism and subjectivism of speakers' internal states. In the last part of this chapter, I will further argue that Hart's inability to account for the evaluative aspect of legal expressions led him to tacitly endorse theories about the meaning of legal expressions that he originally rejected (those theories that were earlier referred to as criterial model theories⁵⁴). I will advance the claim that whereas Hart's intuition of rejecting those theories is, basically, justified their rejection can consistently be performed only by rejecting altogether the sort of semantics that backs them and substituting a semantics that takes into account the evaluative content of legal concepts. Such a semantics, call them *substantive semantics*, will be capable of successfully accounting for the possibility of objective knowledge of normative/evaluative expressions, while avoiding either the insufficiency of the criterial model or the fallacies of the Hartian criticism⁵⁵.

In demarcating the discussion of substantive semantics in the thesis, it should be noted that the essay's interest lies predominantly in making explicit the conditions for the possibility of such a semantics rather than in offering a detailed account of their form and structure. That possibility will be elaborated against the background of the conjunction of two theses: first the thesis that the content of our normative expressions is about the environment (or the world), second the thesis that linguistic content is generated within different

52 Vide CHs II, III and IV.

53 This possibility will be argued against the background of two theses, when they are taken conjointly: First that mental or intentional content is in the first instance about the world and not about any mental intermediaries (infra, Ch II); and second that mental or intentional content can always be individuated via semantic or propositional structures (infra, Ch II).

54 Vide footnote 4 in the introduction of this chapter, supra.

55 Stavropoulos in his *Objectivity in Law* undertakes a similar project though he carries it through in a

instances of a process or practice of communication⁵⁶. The conjuncts are not isolated from each other: the environment is depicted via linguistic expressions *according* to the normative standards that support the practice that generates communication. Those standards constitute the pragmatic dimension of semantic content and are, further, evaluative with the result that content will be, generally speaking, evaluative (CHs. IV, V and VI). Furthermore, to the degree that the practice that generates meaning and content is itself part of the environment, the evaluative standards that support that practice will also form part of the environment.

Whereas I will be arguing within the tradition of theories that advance claims for the evaluative character of all semantic content, my aim is primarily to account for the evaluative character of 'legal' and more broadly practical content. 'Legal' content will be evaluative to the degree that it depicts instances of the normative standards that support the pragmatic dimension of normative meaning and content (CHs IV, V). To understand this, the reader will be asked to picture legal norms as being somehow 'fabricated' within normative practices. This will entail that legal norms will be of the same quality as the pragmatic normative standards that in the first place support the normative practice within which legal norms are depicted; namely they will be norms that guide action. On the other hand, whereas the pragmatic norms that support normative practice will be postulated with a transcendental necessity, legal norms will only be valid relative to actual practices, and to that extent contingent.

DEFEASIBILITY, OPEN TEXTURE AND CONCEPTS' CONTENT

Hart's defeasibility thesis evolves, as already argued, along two parameters: an ontological thesis that rejects legal concepts' empirical status and the further, as it were epistemic, belief that legal concepts are anchored within social (legal) practices, this having something to do with their containing an evaluative aspect. The defeasibility thesis, and the soon after developed open-texture thesis⁵⁷, is mainly a thesis about legal concepts' meaning which, in a way, integrates Hart's ontological and epistemic beliefs: its underlying idea suggests that since legal concepts do not refer to empirical kinds but are social artifacts, their meaning cannot be captured by listing a set of criteria, as in the case of empirical concepts; instead,

rather different way.

⁵⁶ This relates to the Wittgensteinian thesis for the impossibility of a private language; cf. with Ch VI, *infra*.

⁵⁷ H.L.A. Hart, *The Concept*, 121 n. at 127.

in order to capture their meaning, one should try to refer to the relevant practice and the evaluations that are embedded in it. As a result, any effort to imagine legal concepts as referring to extant entities and to list criteria corresponding, as it were, to some counterparts or, worse, ascribe to legal sentences truth conditions, would be absurd. Legal concepts cannot be explicated in this way because they are products of social practices. This is taken by Hart to further suggest that, on the one hand, the content of legal concepts cannot be as determined as the content of empirical concepts can and, on the other hand, that legal concepts contain some evaluation that does not allow one to treat them as empirical in the sense that one would be reducing them, hence would be missing something from their content. In a peculiar way Hart seems to endorse the idea that legal concepts cannot be reduced because they are *indeterminate*, their indeterminability pointing towards their social/evaluative character which cannot be captured in terms of truth conditions. Counterintuitive as it may be, this reasoning is not incoherent when explained against the background of the previous discussion of the Internal-External distinction. Hart seems to be convinced that evaluation is an important feature of legal concepts but, at the same moment, that evaluation cannot be captured in any objective terms⁵⁸. Hence, evaluation is intrinsically connected to indeterminacy, defeasibility of criteria and open-textured rules and, as a result, resists any reduction to objective criteria. As long as objective criteria for Hart can only be non-evaluative facts his thesis is sound; habits, 'external' facts about behaviour, or even definitions and sets of semantic criteria corresponding to 'queer' counterparts are nothing but objective reductions! To the extent, though, that he insists holding evaluations as the most central component of legal concepts, he is ironically himself forced to appeal anew to those reductions, as what matters more in an account of rules and normative concepts is, apparently, objectivity.

Definitions and semantic criteria

Whereas in the case of the command theory of rules reductionism threatens to conceal the specific evaluative aspect of legal-as-social rules, the case of semantic definitions and criteria is slightly different. Treating legal concepts as having fixed semantic counterparts which feature in semantic definitions would be, according to Hart, absurd or even irrelevant. Legal concepts are not empirical and therefore resist any treatment in terms of definitions, criteria and truth-values. The main reason for this impossibility is, notably, the social dimension of

⁵⁸ This is quite paradoxical, since, normally, any denial of reduction should imply that certain concepts are self-standing and that one could ascribe to them genuine properties.

rules and more specifically the force or the internal aspect thereof. Hence the rejection of those theories that base their account of legal concepts on definitions and closed sets of criteria.

A feature common to many philosophical accounts of legal concepts, usually referred to as ‘positivist’, is that they take more general concepts to be conceptually prior to and independent of the more specific concepts⁵⁹ trying, thus, to ‘formalise’ the concept of law. These accounts are *centralist*⁶⁰ in the sense that they try to establish ‘what the law requires’ (the legal ‘ought’), not by reference to the specific legal practices and the associated principles (about what is right, just, or appropriate), but in virtue of a formal ultra-rule, like Kelsen’s *Grundnorm*⁶¹. Usually in these accounts the meaning of legal concepts is explicated through a *definition or criterial model*⁶². This provides a set of criteria or conditions that enjoy the status of degenerate truths and crystallise as something like ‘genuine’ definitions. These sets of criteria form concepts’ extension in an *a priori* way, independently of the concept’s application and the associated legal practices, by constituting something like a logical formula. If for instance the criteria for something to be a contract are x, y and z then everything that is a contract need by definition to abide by those criteria. Obviously the power of the definition model lies in a simple idea: if all concepts can be represented through a logical formula that is immune of all changes then one would secure a high grade of rule-determinacy. Rule-determinacy would be reduced to a simple *modus ponens* argument of the form: ‘if...then...’.

Definitions are taken to be exhaustive with the result that there are only two possibilities for all states of affairs that need to be subsumed under the concept. Either they fulfil the provided set of criteria and present an *easy case* – in another terminology: ‘they fall under the concept’s core (*Begriffskern*)’⁶³ – or they do not and constitute a *hard case* – ‘they fall under the concept’s periphery (*Begriffshof*)’. The ‘periphery’ of concepts, the grey area where definitions notoriously fail, is the reign of uncertainty and indeterminacy, the area where disagreement ensues. Hard cases, thus, seem to be closely identified with those concepts that incorporate a large amount of ‘grey area’ or are, to use Hart’s terminology, open-

59 S. Hurley, *Natural Reasons: Personality and Polity* (New York: Oxford University Press, 1992), 16-17.

60 Cf. *Natural Reasons*, 11.

61 Vide generally H. Kelsen, *Introduction to the Problems of Legal Theory*, trans. by S. Paulson and B. L. Paulson (Oxford: Clarendon Press, 1992).

62 Vide footnote 4, *supra*.

63 This term belongs to Ph. Heck as cited in K. Engisch, *Einführung in das juristische Denken*, 9th

textured⁶⁴. According to a broadly accepted and main-stream classification⁶⁵ these concepts may be: vague legal terms, axiological terms, general clauses and concepts that allow for discretion when applied. To this catalogue are often added legislative gaps that need to be filled by the courts or other officials in order to regulate the relevant cases. Common to all these concepts is a high grade of indeterminacy concerning their meaning. Usually these concepts allow for more than one possible explications of the components that put together their meaning according to different (some times even competing) considerations of practical or other character⁶⁶. The usual conclusion that positivist philosophers draw from hard cases is that they can only be treated through discretion on behalf of the courts. The judge, namely, will be forced to construct a new rule that will govern the novel case, without being subjected to any restrictions posed by the open-textured rule. Though this account is very rough and certainly does injustice to many positivist theories, it captures in some way their main deficiency which is common to all centralist theories in ethics and law; namely the fact that these theories cannot properly account for disagreement about the concepts' content because they are context insensitive. Their inability to do so forces them in its turn to opt for the rather arbitrary discretion-solution. This double deficiency seems to burden most of the positivist accounts of law (Hart's own included, as I will argue in the next).

Criteria and how they are defeated

Apparently defeasibility of criteria and open-texture must have constituted for Hart the strongest evidence that definitions and sets of criteria-as-analytic-truths are untenable as an analysis of legal rules' meaning and legal concepts' content. Further, the phenomenon of new circumstances defeating criteria and definitions clearly must have provided further evidence for Hart's ontology of rules, i.e. the belief that rules are not empirical objects but practice-dependent entities. Since all rules are about is community practice, new circum-

edn (Stuttgart: Kohlhammer, 1997), 139.

64 Vide amongst others K. Engisch, *Einführung*, Ch. 6. Vide also I. Aravantinos, *Introduction to Legal Science* (in Greek) (Athina: Sakkoulas, 1983), 137 n.; P. Sourlas, *Fundamental Issues in the Methodology of Law* (in Greek) (Athina: Sakkoulas, 1986) 82 n..

65 K. Engisch, *Einführung*, 136 n. and 175 n..

66 These concepts have been termed *essentially contested concepts* and have been accounted for -in a more technical way- as 'appraisive and applicable to objects of an internally complex character that may be described in various ways by altering one's view of the significance of descriptions of their component features' in S. L. Hurley, *Natural Reasons*, 46. As essentially contested concepts count usually the concepts of what ought to be done, all things considered, both in the domains of law and ethics. Vide S. L. Hurley, *ibid.* 46 n.; B. Bix, *Law, Language and Legal Indeterminacy* (Oxford: Clarendon Press, 1995), 53-59.

stances are in the position to undermine or to alter past definitions or established sets of criteria, backed by precedent up to that point. And, no doubt, there will always be an indefinite number of novel circumstances in which, 'despite the fact that the accepted set of conditions obtain, the relevant concept's application is defeated'⁶⁷. This account yields to the assumption that rules' social dimension works, somehow, towards the direction of their being constantly 'in the making'; that they have a dynamic side which, whenever new circumstances arise, incorporates new instances of application. Hence, criteria and definitions are incapable of accounting for rules' meaning and concepts' content.

Hart seems to locate the implications of his ontological thesis more specifically at the level of the deficiencies of natural languages. Rules, void from any external empirical content, cannot but exist within our natural languages and therefore to be 'trapped' in the standard deficiencies of vagueness and indeterminacy that burden all species of natural language. It is not very clear what kind of relation Hart envisages between language and the practice of a community and to what extent defeasibility or open texture must be understood as emanating from two distinct sources (legal practice plus indeterminacy of language). Anticipating the discussion that follows, I would like to suggest that this lack of clarity might be highly suggestive as of the insufficiency of Hart's account of normativity. Apparently, to the extent that language is a (social) rule-governed phenomenon, Hart should be treating general rules of meaning on a par with those rules that govern legal meaning. In other words, meaning in general should be, as a normative concept, able to be reconstructed along the Internal-External distinction that applies to all rule-governed social activities. As Hart fails to locate any objective standards at the level of the Internal, linguistic meaning is doomed to be reduced to external regularities of the behaviour of a 'linguistic' community, as much as legal meaning to those of a 'legal' community⁶⁸. Then, of course, indeterminacy of language features as a mystery whose causes lie beyond the evaluations of the community practice, and might be misunderstood as obscurely emanating from some inherent properties of linguistic symbols or the novelty of future states of affairs. Any failure to understand normativity as objective evaluation connected to the question 'what ought to be done?', as a question that makes practices essential in answering it, would threaten meaning *tout court* and not just in legal contexts⁶⁹. To conclude these brief remarks, the problem of indetermi-

67 Stavropoulos, *Objectivity*, 62.

68 The terms 'linguistic' and 'legal' are, here, rather used as referring to different aspects of the practice of the same community.

69 The relevance of the 'what-ought-to-be-done' question applies to all normative contexts including

nacy of language, identified in Hart's terms, is not separate from the problem of indeterminacy at the level of legal rules; in both cases what is asked to be accounted for is normativity and normativity should be treated in a uniform way at any level, whether that be the level of semantic or that of legal rules.

Going back to the reasons Hart offers for the phenomenon of indeterminacy, there are a few points worth emphasising in order to illustrate Hart's unconscious use of substantive evaluations as being decisive for rules' open texture: according to Hart, indeterminacy that is connected to the vagueness of natural language does not always need to be interpreted as a deficiency. It may comply with the important demand of justice according to which legal statutes should enjoy a high grade of generality in order to be able to regulate justly or appropriately future or novel cases⁷⁰. In any case, whatever the reason is (*de facto* vagueness of natural languages or purposeful generality-as-appropriateness), legal language seems to be incapable of *ex ante* anticipating all actual cases or facts that need to be regulated. One could add more complex requirements, like the teleological argument for the certainty of law (*securitas*)⁷¹, according to which law should regulate some sectors of conduct in an unambiguous way and in advance by means of general standards. This second, apparently contradictory, demand perplexes things further and human legislators seem hardly to be able to meet all these challenges successfully, since – according to H.L.A. Hart's expression – they

labour under two connected handicaps...The first...[being their] relative ignorance of fact [and] the second [being their] relative indeterminacy of aim⁷².

Clearly all these reasons for indeterminacy are rather connected to evaluative points than merely to inherent deficiencies of language or the limited capacity of legislators to anticipate future aims and states of affairs. Arguably, Hart's own position that indetermi-

rules of meaning. In the latter what is asked is 'what is the right way of saying this?' (say the meaning of 'add 2'). Clearly this view envisages language/communication as a form of action that is performed through the utterance of sentences (as speech-acts).

70 Vide for this reasoning H. L. A. Hart, *The Concept*, 129 n.; Vide further P. Sourlas, *Fundamental Issues*, 84; vide also Hans Kelsen's discussion on intended and unintended indeterminacy and the gaps in law, in his *Introduction to the Problems of Legal Theory*, 77-89.

71 For the very important distinction between the *stricto sensu* certainty of law (*securitas*) as a teleological argument of policy and the certainty of law (*certitudo*) as a normative argument of principal, vide the interesting analysis of P. Vassilogiannis, 'Nullity and Annulability of Unconstitutional Norms' (in Greek), *Isopoliteia* 1 (1997), 161-199 at 172.

72 Cf. H.L.A. Hart, *The Concept of Law*, 125.

nacy is to be valued in several cases, suggests that defeasibility may rest on autonomous substantive points which rank above criteria and definitions.

Be that as it may, Hart's inability to build into his account of meaning objective evaluations, imposes clear limitations upon his effort to undermine criterial and definitional semantics. As a result, the defeasibility thesis can be pursued, only not too far: since defeasibility is identified with the evaluative side of legal concepts (the Internal) it can be sustained only up to the point that evaluation, in Hart's terms, can be accounted for; when evaluation threatens to collapse into subjective attitudes, defeasibility, in its turn, threatens to amount to a total loss of meaning. The Hartian social scientist needs urgently to resort to external regularities of behaviour and new definitions and criteria in order to rescue normativity and meaning respectively. In effect, defeasibility rejects the ideal of closed sets of criteria only to endorse it at a later stage.

Criteria from the back door: a necessary evil

Hart's manoeuvre that purports to rescue normativity from the contingency of the Internal, consists, notably, in an effort to reconstruct the External against the firm ground of objectively observable community practices. The Rule of Recognition (the ultimate rule in the Hartian legal realm) propagates the possibility of an objective social science that observes and records in an 'uncommitted' way social practices and lists criteria for the application of legal rules⁷³. As argued, this uncommitted understanding can only be too committed on pain of otherwise slipping towards an extreme external point of view and the loss of any meaning and understanding. But the only commitment Hart's account allows for, is the one to subjective attitudes. The threat of radical subjectivity pertaining to such a solution, forces Hart to remain silent as to the content of commitment and to stay at the level of the practice, thus emptying patterns from their contents⁷⁴. Rules' extension is canvassed against the as-a-matter-of-fact occurrence of patterns which are objectively observable⁷⁵. 'What people did until now' is considered to constitute a convention from which criteria for the extension of

73 For a comprehensive discussion of the Hartian programme of an uncommitted social science see McCormick, *H. L. A. Hart*, Ch 3. Similar ideas are to be found in P. Winch, *The Idea of a Social Science* (London: Routledge and Kegan Paul, 1958), to which Hart makes numerous references.

74 Vide Stavropoulos, *Objectivity*, 60-61.

75 Hart probably takes as a proof for the subjective quality of evaluations, the case when a community member is committed to a rule that the community does not endorse. In this case Hart would exclaim, 'you see important is what the community does!' But the problem here is not on which grounds one endorses or not a rule. The problem is to what extent rules are intelligible. On this level the example is not really in support of Hart's position.

rules and the content of concepts emerge. (As if the fact of the occurrence of some convergent behaviour could ever generate a convention prior to the convention's substantive point). In this picture the Hartian scientist is in agony to gather from past behaviour as many criteria as possible before divergence breaks out amongst the members of the community and the content of the rule dissolves. His knowledge of the rule derives from a painstaking collection of behavioural data. But, alas, he will never have enough data as to establish the rule when disagreement will break out. It will always be too early to determine the rule precisely because, in the Hartian realm, he is simply not allowed to know the rule.

Conversely, as I argued earlier, knowing the rule would be independent from the quantity of the samples of the rule's instances of application. Such knowledge would merely involve a substantive point able to group together new instances of application, as much as past ones, without using analytic definitions and closed sets of criteria. In the face of lack of any such point, Hart's theorist is doubly burdened: he appreciates the importance of evaluations for the meaning of normative concepts and rules, without being able to free himself from the restrictions of traditional criterial semantics. As a result, he identifies the content of legal concepts and the extension of legal rules through criteria that allegedly derive from the communal practice, but are not in position to explain what the content of either the concepts or the rules is. When new circumstances arise, past, 'conventional' criteria, empty of the 'point' of the convention that underlies them, are in turn defeated. When in the little church community of our hat-removers, a part of the aisle collapses and a group of construction workers enters the church in their yellow safety helmets in order to fix it, the conventional rule ceases to have only one meaning⁷⁶. Re-capitulation of the past applications will not offer any answer as to what the meaning of the rule is or was. Conventional criteria will not be able to offer a solution to the problem of which type of 'hats' the rule refers to, unless the issue of the purpose of hat-removing is properly addressed. In other words, any alleged advantage of conventional criteria *vis-à-vis* analytic truths and definitions will always wither away as long as the substantive point of conventions is suppressed. In fact, just to make things worse, conventional criteria, as patterns disconnected from their contents, will just step into the role of analytic truths and closed sets of criteria.

In all, Hart's defeasibility thesis ends up defeating its own core, i.e. the seminal insight that closed sets of criteria are not suitable to capture rules' extension, hence that rules

76 Vide Dworkin, *Law's Empire* (Oxford: Hart, 1998), 46-49; 62-68; and for the paraphrase of the example A. Takis, 'The Internal', 79-82.

‘cannot step forward to claim [their] own applications’⁷⁷. In Stavropoulos’ words:

Instead of concluding that application turns on substantive...judgements, [Hart] retreats into a position in which the rule does step forward, only not far enough⁷⁸.

This self-defeat is the result of the non-fulfilment of an implicit promise that the defeasibility thesis seems to make initially; namely that discredited criteria will be replaced through an account of meaning that would exploit the way circumstances defeat criteria. Instead, it ends up substituting a new species of criteria (empty patterns of social behaviour) which are equally defeasible by circumstances. This move renders defeasibility, to say the least, trivial since rules are going anyway to be analysed through criteria and will anyway turn out to be indeterminate.

Having said that, a large part of the value of the insight that circumstances defeat criteria lies, as argued, in its rejection of semantic or criterial definitions and closed sets of criteria for meaning. In rejecting criteria, though, the defeasibility thesis should not be taken to suggest that meaning will always be defeated, but merely that meaning has to be constructed along different lines. Since the emphasis of the open-texture argument is placed upon the power of novel circumstances to defeat definitions, the suggestion of an alternative conception of meaning would have to exploit the idea of novel circumstances. Finally, since the aim of defeasibility is not to defeat meaning in every case, novel circumstance should be understood as playing a positive role, besides the negative function of defeating discredited definitions; this should involve a contribution to a fresh account of meaning. These are roughly the lines along which a context-sensitive account of meaning should be built.

Instead, Hart’s account views circumstances as being external to the meaning of rules and concepts. As a result, Hart’s only chance to rescue meaning is to endorse tacitly a definition model based on conventional criteria. Conventional criteria function anew as conditions that yield support independently of circumstances. The meaning of a concept is fixed *prima facie* according to the putative criteria and only at a later stage circumstances are employed to the purpose of confirming the initial judgement⁷⁹. To conclude, Hart fails to see that conditions of meaning are revisable from within according to novel circumstances, and retains that definitions are the only way to capture rules’ extension. Easy cases are,

77 Vide Stavropoulos, *ibid.*, 68.

78 *Op. cit.* 68.

79 Stavropoulos, *op. cit.*, 64.

thus, cases where conditions obtain according to the definition model, whereas hard cases, mysteriously, show that definitions are just not always good enough! Clearly the most apparent implication of Hartian Semantics is widespread indeterminacy which, at the level of judicial practice, leads to an extended discretionary application of rules (To that extent Hart's account does not vary considerably from other positivist accounts of law which rely upon definitional semantics).

But if Hart's defeasibility model were sound, its most disastrous implication would be that definitions are never good as a means to explicate meaning. On the defeasibility model, one cannot rely on any definition of a concept's content, since any component of the definition is potentially, under the light of defeasibility, true or false for reasons that cannot be accounted for in a rule-governed way. It is not hard to see how such a conclusion would lead to indeterminacy and the loss of meaning *tout court*. Nevertheless this warning does not aim to question the role that criteria play in a truth-evaluable account of meaning, as after all Hart's account could be taken to be⁸⁰. I would, by no means, wish to question the possibility of explicating legal concepts through truth-evaluable components⁸¹. However, the great value of criteria notwithstanding, I want to put forward the view that criteria are not decisive for meaning in the last instance. The great lesson of the defeasibility thesis is that criteria are defeated by circumstances to the extent that they are linked with concepts' evaluative points. As Stavropoulos argues⁸², these points are appreciated and accounted for through substantive theories that hold together criteria, conditions and definitions⁸³. To the degree that they are the conclusion of such theories, conditions or criteria are not exclusive; they constitute instances of the property of a concept but there are always other conditions

80 This claim might strike one as rather strange considering Hart's refusal to accept a truth-evaluable account of legal concepts similar to that of natural kind concepts. It does not, however, seem to be unjustified in view of Hart's *actual* treatment of legal concepts' meaning. Both the tacit endorsement of definitions, as an undesired conclusion of the defeasibility thesis, as well as the very core of this thesis -namely, defeat of criteria in the face of new 'facts'- seem to favour a somewhat realist treatment of legal concepts.

81 One should distinguish between those legal concepts that are genuinely normative (like 'obligation', 'contract' and so on) and those that are empirical (like 'thing', 'payment' etc.). Clearly in the latter case criteria will be much more reliable in determining meaning than in the former. Conversely lists of criteria for normative concepts will be sensitive to the specification of substantive points. I owe this remark to Carsten Heidemann.

82 Vide Stavropoulos, *Objectivity*, 62-68, *passim*.

83 It will be later argued (CHs V and VI) that the construction of theories that specify substantive points is not unconstrained. Substantive theories are constrained by the content of the pragmatic claims that are implied through the act of uttering sentences in a communicative process. Those claims, it will be maintained, enjoy the status of transcendently valid norms against whose background communication is rendered possible.

that can be instantiations of the same property. Which conditions belong to the content of a concept at a given time can only be decided through the theory that accounts for the concept's evaluative point. On this account, new circumstances are not external but internal to concepts' meaning⁸⁴. Hence, the defeasibility-thesis does not after all show that meaning is defeated *qua* defeat of definitions, but, conversely that definitions are amenable to revision *qua* the dynamic perspective that substantive points confer upon meaning. This way of understanding meaning has the advantage of reconciling a truth-evaluative account with Hart's insight about rules'/concepts' evaluative aspect which relates to their social dimension, without slipping towards reduction and indeterminacy.

NORMATIVE OBJECTHOOD: AN ANTI-REDUCTIONIST SOLUTION

The discussion has suggested that Hart's refusal to allow for any notion of 'objecthood' of norms is entrenched in his beliefs about the nature of the internal or evaluative aspect of legal/social rules, and vice-versa. Hart's account of the Internal reveals his conviction that he has discovered *the specific difference of normativity* as opposed to all other non-normative factors that influence action. Connectedly, instead of conceiving rules as empirical entities akin to natural kinds, Hart confidently submits the view that rules are products of the social environment and argues that in order to account for their (evaluative) content one has to refer to the relevant social practice and the evaluations embedded in it.

So far so good. But then, as this chapter argued, Hart proceeds to reconstruct the internal aspect of rules by taking the *internal subjective attitudes of their addressees* to be constitutive for the rules' content. In doing so he loses hold of *objectivity* as a property of the internal aspect of rules and normativity in general. This became acutely evident in the discussion of the defeasibility thesis: normative meaning is constantly defeated as novel cases point anew towards the fact that normative vocabulary does not 'refer' to any permanent feature of the rules that is external to the participants' subjective states and, insofar, objective.

In contrast to Hart's picture a modified version of *MacCormick's hermeneutic point of view* was appealed to in order to argue that normativity is better accounted for by assum-

84 Vide Stavropoulos, *Objectivity*, 62-69. For a more detailed discussion of the idea that circumstances or generally context determines the content of our thoughts and the implications of this idea for knowledge, see John McDowell, 'Criteria, Defeasibility, and Knowledge' and idem, 'Knowledge and the Internal', both in idem, *Meaning, Knowledge and Reality* (Cambridge Mass.: Harvard University Press, 1998), 369-394; and 395-413 respectively.

ing the existence of some cognitive operation on behalf of those who appreciate a rule. In connection to that operation the natural question to be raised is ‘what objects is the cognitive operation directed to?’. The process of answering that question will more or less occupy the rest of the thesis. It will unfold as an endeavour to purge an account of legal rules and properties from Hart’s psychologism and to arrive at a proper antireductionist account of normativity.

Part two of the thesis opens with a more rigorous analysis of the reductionism of normative properties and entities. The ensuing discussion argues for the need of a notion of *normative objecthood* as a prerequisite for objective normative knowledge. The content of this claim is the modest idea that the notion of objective knowledge requires an object of cognition that is distinct from the knowers’ internal psychological states⁸⁵.

The dismissal of internal psychological states is tendered as part of a broader critique of *psychologism* concerning semantic content and meaning (Ch II). This critique will serve for preparing the ground for a semantic account of the ontology of legal norms and properties (CHs III and IV). In it the *objecthood* of norms and properties will be explicated through the *objectivity* pertaining to the semantic forms of our sentences, owing to the fact that those forms display objective logical structures. In taking semantics to be objective I will rest on a conception of semantics as being free from subjective psychological states, a conception whose main tenets were first advanced by Gottlob Frege. Insofar the undertaken effort for disentangling normativity from subjectivism will exhibit analogies with Frege’s dedicated interest in freeing semantics from psychologism.

85 Apart from internal states the anti-reductionist argument will also consider types of *physicalist* reductionist moves (i.e. reductionist moves that rely upon movements, physical properties and so on). However, reductionist moves that are performed through internal psychological states will be placed in the centre of the discussion for two reasons: First because as the discussion in this chapter showed, normative reasons can be very easily confused with internal psychological states; and second because the dismissal of internal states dovetails with the ontological account of norms that is going to be argued for in part II.

PART TWO

LAW'S ONTOLOGY

CHAPTER II

THE ISSUE OF REDUCTIONISM

INTRODUCTION

The discussion until now suggested that Hart's semantics was clearly directed against reductionism concerning legal expressions. Disregarding its inherent weakness, Hart's anti-reductionist move has pointed towards the fact that legal expressions cannot be reduced to other co-extensive non-legal expressions if they are to pick out what is specifically normative about legal phenomena. But if legal expressions are not amenable to semantic reductionist moves then there is a strong presumption that they pick out, or refer to, properties and entities that are 'primitive' and can not be reduced to other co-extensive non-legal properties or entities. In that case the irreducibility of legal expressions will rest on the *ontic autonomy* of their referents. For this reason the issue of reductionism offers itself as a good way of tackling the semantics of legal expressions and the ontology of the entities or properties they denote. Those semantic and ontological questions about legal expressions are, further, tightly connected to the proof of the possibility of objectivity in law, which is the main concern of this dissertation.

The chapter opens with a general account of the rationale and the main variants of reductionism. Then I discuss some basic objections that have been directed against reductionist moves. Frank Jackson's attempt to offer an account of the way ethical properties *supervene* on descriptive ones is next discussed as the most serious attempt available hitherto to account for normative discourse within a *physicalist* picture of the world. In rejecting this account I argue that it is necessary to expand our ontological commitment to entities that are normative and hence non-physical. In the remaining of the chapter I paint with a broad brush the main tenets of an ontological account that is capable of admitting the existence of normative (abstract) entities.

One last methodological remark: in the ensuing discussion I will refer interchangeably

bly to two levels of reduction: reduction on the level of concepts¹ and/or names (*semantic reduction*) and reduction on the level of properties and/or objects (*ontological reduction*). Semantic reduction aims to show that normative terms can be reduced to non-normative terms. The success of that claim relies heavily on the assumption that the properties picked out by normative concepts or the objects referred to by normative names, are nothing more than non-normative, physical properties and entities. It is on the latter, the level of ontic commitment, that the autonomy of legal discourse is decisively challenged.

NORMATIVE EXPRESSIONS AND THEIR REFERENTS

Regarding the irreducibility of normative expressions a lot will depend on the irreducibility of their referents. The latter will in its turn depend upon whether every normative property is identical with a non-normative property. The reductionist will typically try to argue that every normative concept can always be reduced to a *co-extensive* non-normative concept to the extent that both pick out the same property. This claim will usually be supported by the thesis that the environment or the world is put together by one kind of entities/properties only which are non-normative but descriptive or physical. Let me assume for a moment that we don't know anything about the exact relation between normative and non-normative properties, and remain on the level of the concepts that we employ in our every day discourses. At this level, it seems quite plausible that we can make fairly uncontroversial claims as to which concepts are normative and which are non-normative. For instance, 'obligation' can with safety be classified as being a normative concept whereas 'fear' as a non-normative one. Now, if we suppose that concepts normally pick out properties² then we can

1 Generally the term 'concept' will be used throughout the dissertation in a Fregean sense: according to Frege's philosophy, 'concepts' or 'Begriffe' are something akin to 'empty' or 'unsaturated' predicates that are saturated by singular terms (or object-terms) like in the schema: $F(x)$; this combination of the concept-term with the object-term amounts to the existence of an object (Cf. With the discussion in Ch III, sec. 5, *infra*). For instance if F stands for 'horse' then the object *horse* will exist if there is something that is 'horse'; or $\exists(x): F(x)$. To that degree an object will exist to the extent that a series of properties – that are associated with it – obtain. For the purpose of the discussion of reductionism in this chapter I will adopt a more flexible use of the term 'concept' as lying somewhere between 'name'/'singular term' and 'predicate'. Accordingly 'concept' will stand for the object denoted by an object-term that falls under the relevant predicate/concept-term (with the result that a series of properties obtain). For instance the concept 'contract' will refer to the object *contract* that has a series of properties.

2 The claim that concepts pick out properties is not uncontroversial. A major objection to it (a so-called anti-realist or non-realist) is that it is impossible to distinguish between a concept and the relevant property. On that view a self-standing definition of concepts would raise serious questions as to whether concepts are specific categories of sign-series (and if they are then of which series)? And so on. On the other hand an extra-linguistic understanding of properties would require a very demanding

conclude that *prima facie* for a property to be normative a necessary and sufficient condition is to be picked out by a normative concept, or:

- (i): A property is normative (NP) if and only if it is picked out by a (at least one) normative concept (NC).

Automatically it follows that for a property to be non-normative a sufficient condition is not to be picked out by a normative concept, or:

- (ii): A property is non-normative (NNP) if and only if it is not picked out by a normative concept (NC).

Now, following (i) and (ii) the reductionist will want to argue that if a NP is shown to be identical with a NNP, then it is possible to be picked out by a non-normative concept (NNC). This is possible since (i) allows that a NP can be picked out by at least one NC but also by some NNC. The next step is to argue, on the basis of (ii), that NCs can be substituted by NNCs: if every NP is after all identical to some NNP, then the best way to pick it out is by using a NNC, as it is impossible for NCs to pick out NNPs. Clearly the premiss that supports the reductionist move is the claim that every NP is at the end of the day non-normative. This claim is usually put forward on the basis of an *identity statement* that connects some NNC with the relevant NC in the target area: if one can talk about NPs by using NNCs then those properties can be taken to be non-normative. Conversely the reduction will fail if it is shown that it is not possible to pick out NPs by using NNCs, hence, that there is no identity relation holding between the non-normative and the normative properties.

Of course there is an issue here as to which is the actual level of reduction: that of concepts or that of properties. Concepts are, arguably, merely terms for properties and, at the end of the day, what is crucial for the success of reductionist moves is what really exists, i.e. what kind of entities and properties there are. Nevertheless, as both (i) and (ii) imply, the vocabulary we use to describe what exists, or the level of semantics, can be taken to be of constitutive importance for the sort of entities and properties that we commit ourselves

ontology. These serious objections notwithstanding, I am inclined to believe that there still is room for talking of concepts as picking out properties for the simple reason that our language still relates to something that is not entirely in our heads/minds but external to them, i.e. in the environment. For a more comprehensive discussion of these problems see Ch III, *supra*. I thank Carsten Heidemann for pointing to me the complexity of the concepts-properties relations.

to, in other words the level of *ontic commitment*. Accordingly, for the success of reduction, even if a lot depends upon the ‘discoveries’ on the level of properties, the semantic level (concepts) is constitutive in pointing towards what can be discovered and what not³. To that extent the level of concepts and the level of properties are closely interrelated. Given further the fact that reductionism aims to undermine the existence of normative properties, one could safely conduct the investigation as to whether reductionism’s claim is true, by focusing upon concepts: if it is possible to substitute a class of normative terms through non-normative ones this can be readily taken as an indication for the possibility of the reduction of the corresponding properties; and vice-versa. For that reason, anytime that I will allude to the simplicity of identifying properties through concepts, I will still take it to be true that the decisive level of reduction in the normative domain is the ontological level.

Reductionism aims at the level of the ontology of normative expressions. Accordingly, a large portion of reductionism’s success will rest upon the possibility of identifying normative entities and their properties with non-normative entities and properties. Those could either be mental entities and their properties (some forms of expressivism or projectivism in law and ethics) or other non-mental physical, yet descriptive, entities and their properties (say something akin to the reducing properties employed by the command theory of law)⁴. In both cases reductionism assumes, roughly, that normative concepts can be substituted by non-normative ones because there is only one kind of properties available to be picked out, namely physical properties. It is for this reason that the actual success of the whole project depends largely on the reduction of the ontological level (properties, objects). I will try to argue that reductionism’s main assumption is wrong. Normative concepts are irreducible because they pick out properties or refer to entities that are distinctively normative and, hence, not identical to any other non-normative property or entity. Put it in a different way, the normative vocabulary is not interchangeable with any non-normative vocabulary because normative properties and entities are not reducible to non-normative ones. Along these lines, one would have to block reductions on the ontological level if one wants to establish the relative mind-independence and autonomy of legal (normative) entities and their properties *vis-à-vis* all physical entities and their properties. This could be readily achieved by showing that the normative vocabulary cannot be restated in non-normative

3 In any case if there is any way of taking anti-reductionism seriously this is by assuming that, on the ontic level, there are properties and generally entities that are not physical. Otherwise, by making our starting point the assumption that what there is is only physical, we fix the issue of reductionism from the outset.

terms. Of course, a lot remains to be said on the ontic quality of normative entities; yet I would like, at this point, to anticipate that legal norms and other terms can be understood as referring to non-physical entities that are external to minds which, nonetheless, are intellectual products. Before investigating the possibilities for an ontological explication of legal and generally normative referents, any possibility of reductionism has to be blocked. To this purpose I am going to give a brief account of *ontological reductionism* and then offer a general argument against it, which is able – if not to fully rebut – at least to put in serious question its rationale.

Put in a general form, reductionism's aim is to show that where we thought we had two sets of concepts, entities, laws, explanations or properties, we actually have only one which is furthermore perspicuously characterised in terms of the reducing vocabulary⁵. The general claim of reductionism is certainly one of *ontological conservatism*⁶, and can be restated as the 'physicalist' or 'naturalist' claim that all properties/entities are nothing more than physical properties/entities and, as a result, can be described through predicates of the sciences (with more basic those of physics). According to a standard classification⁷ there are two sorts of reductionism depending on whether the reductionist move aims to eliminate a class of non-physical properties by claiming that these properties are never instantiated (*eliminative reductionism*), or to reduce a class of non-physical properties by equating them to correlate physical properties (*identity reductionism*). Eliminative reductionism takes non-physical concepts from different domains (psychology, ethics, metaphysics, etc.) as failing to refer to any kind of properties. 'Cyclops', 'contracts', 'consciousness' and 'qualia', are equally assumed as referring to non-existing entities, because there are no such things that have the specified properties. This kind of reductionism goes beyond the sceptical claim that it is impossible to know the truth about some area. It claims that there is no truth to be known in the target area. In fact our use of terms like 'Cyclops' and 'contracts' rests on a serious error that we commit when we ascribe a class of non-existing properties to the environment. *Projectivism* in ethics and, generally, in normative discourse, is a case of eliminative reductionism that denies the existence of truth-values in respect to normative properties and endeavours to replace normative concepts with non-normative ones that refer to existing properties. Typically, the eliminativist in the domain of normative discourse will aspire to

4 Vide the discussion in section 4 of this chapter, *infra*.

5 See D. Charles and K. Lennon, 'Introduction', in Charles and Lennon (eds.), *Reduction, Explanation and Realism* (Oxford: Clarendon Press, 1992), 2.

6 See Stavropoulos, *Objectivity*, 70.

substituting normative concepts through (non-normative) concepts of a basic science that refer to physical (non-normative) properties. (Of course the underlying assumption shows that a strong view about what is capable of being a property is already built in into the reduced terms' 'failure of reference'). The second sort of reductionism, identity reductionism, does not deny the ability of a class of non-physical terms to refer to some properties or entities, but observes that those properties/entities are 'nothing more than', i.e. identical with, some physical properties/entities that are equally picked out by the concepts of some basic science. In the domain of normative discourse, expressivism⁸ is an example of identity reductionism as it allows for normative concepts to refer to properties but comments that those properties are always cases of disguised non-normative properties (psychological or other mental properties, like emotional states).

Clearly both types of reductionism can be taken as departing from the same premiss, namely the assumption that there is only one class of entities and/or properties that constitute the fabric of the world: physical entities and/or properties. The difference between the two types of reductionism lies in the degree of 'purification' that they undertake in respect to the area of the reduced properties/entities. While the eliminativist completely denies the existence of any kind of properties/entities to which the problematic class of terms refers, the identity reductionist prefers to take those terms to genuinely refer to some properties/entities, only that those properties/entities are not of the sort expected but are disguised physical properties/entities that can equally (and probably much better) be picked out by the terms of a basic science. Eliminativism is a rather extreme view and therefore most of the contemporary reductionist moves rely on the identity rationale⁹. Be that as it may, eliminativism can be taken to point towards the important fact that non-physical (normative in our case) terms stand or fall together with their counterparts, namely the non-physical (normative) properties/entities in the target area. That, in other words, one cannot allow for the use of a vocabulary unless one allows for the existence of the corresponding properties/entities. Notoriously, eliminativism's aim is to reject both each time the level of ontology ceases to be physical. Nevertheless, if one were able to demonstrate that non-physical (normative in

7 See Stavropoulos, *Objectivity*, 70.

8 Contrary to this view S. Blackburn tries to reconstruct Expressivism (or *Projectivism* as he calls his variant) about moral/ethical sentences as a non-reductive theory. For a brief account of this endeavour see the entries 'emotivism', 'expressivism' and 'projectivism', in Simon Blackburn, *Dictionary of Philosophy* (Oxford: Oxford University Press, 1996). For a convincing criticism of those views, vide Ronald Dworkin, 'Objectivity and Truth: you'd better believe it', *Philosophy and Public Affairs*, 25 (1996), 87-139 (110-112).

our case) concepts cannot be taken to be dispensable in the description of some domains of our discourse, one would be justified in inferring the existence of some corresponding non-physical normative properties¹⁰.

The identity formula

Central in any reductionist project is the belief that any judgement of the various domains of knowledge is identical with a judgement of natural sciences and, further, that it is about physical things¹¹. This belief is formulated as an identity statement (I.S.) between predicates (i.e. concepts) occurring within judgements of other 'special' domains of knowledge ('S') and those occurring within judgements (laws) of natural sciences/physics ('P')¹²:

$$(I.S.): Sx \leftrightarrow Px$$

The challenge of reductionism arises when, in the above formula, ' \leftrightarrow ' is interpreted as bringing about the relation of identity¹³. It is only on this interpretation that reductionism is combined with physicalism (or naturalism) or the belief about the ontological supremacy of

9 See generally the introduction in Charles and Lennon, *Reduction, Explanation, and Realism*, 1-18.

10 This formulation seems to agree with the aforementioned relation between concepts and properties. Vide the 'Introduction' in this chapter, *supra*.

11 One should probably allow for a more subtle formulation here. Reductionists do not always strictly postulate an one-to one correspondence between physical and non-physical properties. It is often the case that they take the reducing property to be based on a disjunction of the different kinds of base property on which the higher-level reduced property rests. This formulation is a reaction to the anti-reductionist accusation of *multiple realisation*, or the claim that there is no unique natural property which is coextensive with each non-natural one. See Fodor, 'Special Sciences (or: the Disunity of Science as a Working Hypothesis)' in *Synthese* 28 (1974), 97-115, and Charles and Lennon, *ibid.*, 7. I thank Timothy Williamson for raising the point that reductionism need not be in any case physicalist.

12 For a similar formulation see Fodor, 'Special Sciences (or: the Disunity of Science as a Working Hypothesis)', 97-115 (99). Fodor gives a more detailed account of the reduction of the laws of 'special sciences' to those of Physics:

$$S1x \rightarrow S2x$$

$$(2a) S1x \leftrightarrow P1x$$

$$(2b) S2x \leftrightarrow P2x$$

$$P1x \rightarrow P2x$$

Where S1, S2 are predicates of a special science and P1, P2 predicates of physics; the formulae (1) and (3) are laws of a special science and physics respectively. The formulae under (2), the so-called 'bridging laws', express the central claim of reductionism which is the identity of predicates between the reduced and the reducing domain. Fodor's account is still about the relation between special natural sciences and the physics, but I think that it can readily be expanded towards other domains of knowledge, like the so-called social sciences and the legal science.

13 Clearly in the above formula (I.S.) the reductionist relation could be substantiated in the opposite direction: as the reduction of all physical entities/events to normative entities/events. However, apart perhaps from some representatives of Neo-Kantianism, this view is not tendered by anyone these days.

physical properties/events which, further, identifies physics as the basic science. We can distinguish two versions of physicalism:

A weak version which takes I.S. to express event identities¹⁴, in the sense that every event which falls under the predicate S is identical with some event falling under the predicate P (in other words, it is a physical event). Here the identity relation ‘infects’ only events; properties are still taken to be in a sense irreducible and to belong to autonomous domains of knowledge. In this weak version of physicalism (which Fodor labels *token physicalism*¹⁵) the overall claim is, roughly, that ‘every event which falls within the universe of discourse of a special science will also fall within the universe of discourse of physics’¹⁶ and it entails the generality of physics as the basic science¹⁷.

A strong version of physicalism which holds that every property mentioned in the judgements of any special domain of knowledge is a physical property (what Fodor calls *type physicalism*)¹⁸. An even stronger formulation of this doctrine occurs after adding the assumption that in an ideally completed physics there are natural kind predicates which correspond to each predicate in any ideally completed special domain of knowledge. Here the identity relation ‘infects’ properties or even predicates.

ANTI-REDUCTIONIST OBJECTIONS

The most common way to undermine reductionist moves of the ontological kind is by undermining the identity statement (I.S.). This is the case whenever one interprets the relation denoted by ‘ \leftrightarrow ’ as meaning ‘bring about’ or ‘cause’. This interpretation amounts to renouncing physicalism. The main effect of such an interpretation is that the formula (I.S.) ceases to be an identity statement and the relation between Sx and Px becomes asymmetric. Here the formula’s claim is, at the most, ‘that...x’s satisfaction of a P predicate and x’s satisfaction of an S predicate are causally correlated’¹⁹. The essential difference of this claim from a genuinely physicalist one is that S and P predicates apply to the same things without

Cf. with fn 50, *infra*.

14 More accurately, to express ‘contingent event identities’, since the identity is between an event falling under S and *some* identical event falling under P; see Fodor, ‘Special Sciences’, 100. It seems quite controversial, though, whether one can talk about contingent identities, since the notion of identity involves already some form of necessity, as Timothy Williamson pointed out to me.

15 Ibid. 100.

16 Ibid. 101.

17 A stronger version of ‘token-physicalism’ is materialism, which in addition to the former says that every event falls under the laws of some science or another; see Fodor, ‘Special Sciences’.

18 Ibid. 100.

its necessarily being the case that S predicates are physical (or reducible to P predicates). According to such a modest claim a legal predicate (S) ('being under a contractual obligation') could be directed to the same thing (x), say an agent or an action, as a psychological predicate (P) would ('being under the fear of sanctions'). But the event of x's satisfying S should not in any sense be other (psychological or physical) than a legal event²⁰.

The relation of Supervenience

Instead of talking about a causal link, a more appropriate way to present the asymmetry between normative and non-normative properties, is by introducing the notion of *supervenience*. This is justified on the remark that a causal relationship usually requires that there is an antecedent and a consequent of which the former is temporally prior to the latter. Clearly such a requirement would not correspond to the way things are since, in most of the cases, a normative property occurs simultaneously with some corresponding non-normative property. Regarding this problem, the relation of supervenience seems to offer a satisfactory answer. The claim of supervenience is, roughly, that indiscernibility in all physical respects between two events, worlds or situations requires indiscernibility in all non-physical (in our case normative) respects²¹. This claim was initially formulated by Donald Davidson in connection with the relation between mental and physical properties but can safely be expanded in order to include other non-physical, higher level properties. By unveiling the indiscernibility relation between physical and non-physical properties, the claim concludes that non-physical properties are supervenient on physical properties. There are two ways to interpret the reality of the higher-level normative properties within the supervenience claim²². The weaker way is to say that whenever we discover indiscernibility on the level of physical properties between two situations, we are required to attribute indiscernible normative predicates to them, however without being committed to regarding those predicates as picking out genuine properties (*ascriptive supervenience*). This is commonly the strategy followed by some eliminativists in the domain of ethics (projectivists) who do not want to allow for any normative properties on the level of ontology but want to guarantee some

19 Ibid. 99.

20 A legal event would be something like the application of a normative predicate to an agent x, on the basis of a legal rule R: x's fulfilling R's conditions for being negligible. I owe this thought to some related remarks of Carsten Heidemann.

21 See Charles and Lennon, 'Introduction' in *Reduction, Explanation and Realism*, 14.

22 Ibid. 14-15.

objectivity within normative discourses²³. Regarding the earlier remarks on the ontic commitment of eliminativism, it seems that the most consistent conclusion on the level of concepts or predicates would be to substitute them through non-normative ones and, therefore, perform a full reduction on both the level of properties and that of predicates. To that extent the strategy of the ascriptive version of supervenience can be criticised as a disguised version of reductionism. A much more promising way of interpreting the supervenience claim is by taking indiscernibility of non-normative properties to necessitate indiscernibility of the normative properties of a situation or an object (*ontological supervenience*). Accepting this kind of supervenience requires one to adopt a realist view concerning higher-level properties. As a result the necessity involved does not merely depend on our practices and conventions (as it, roughly, does in the case of projectivism), but is taken to derive from the features of the environment. Still the autonomy of normative higher-level properties is merely relative in the sense that they are determined by the lower-level properties. Accordingly, the statements of an account of higher-level properties will be true in virtue of the truths of natural science.

The ontological version of supervenience clearly offers the basis for a more robust underpinning of the ontology of normative properties. As a result it is able to block reductions of the Normative to the Non-normative in a successful way. However it may be, it still remains an open question, within the scope of supervenience claims, how strong one takes the interconnection between the higher-level and the lower-level properties to be. Whether, namely, one takes normative properties to be over and above lower-level non-normative properties, endorsing thus a radical form of property dualism; or whether one takes them to be resting upon physical properties in a way that the latter retain the exclusive right to feature in causal explanations. In any case, the claim of supervenience favours a broadening of the basis of our ontic commitment towards accommodating a wide spectrum of non-physical properties, events and, further, facts and objects²⁴. Such an expansion to non-physical objects/facts might seem controversial in the light of Fodor's remark that all entities should be accommodated within the class of physical things; but, I believe, such a constraint is not entirely tenable in an extra-scientific context; the idea of an *ontological monism* on the level

23 Vide Simon Blackburn, 'Moral Realism', in idem *Essays in Quasi-Realism* (Oxford: Oxford University Press, 1993), 111-129 (first publ. in J. Casey (ed.), *Morality and Moral Reasoning* (London: Methuen, 1973)).

24 In the next section I am going to discuss a strategy of 'objectification' of legal/moral norms in which norms feature as 'modal meta-facts'; against the background of that discussion it is not really of much importance if one talks about events or objects (as facts).

of things/objects combined with a pluralism of properties or events presupposes, first that there are only physical things and, second, that those things accommodate all kinds of properties owing to their basic-level ontological priority.

The untenability of ontological monism: the asymmetry of entities

Both these convictions are too strong and could be undermined. To the first point: a closer examination of the referential function of sentences seems to allow for the existence of non-physical (abstract) objects and facts, besides physical ones²⁵. A normative object or fact, say a rule about negligent conduct, can certainly be taken as referring to and grouping together some physical entities²⁶, e.g. a series of movements, or brain states of some sort, or other non-normative entities, like certain psychological states; nevertheless, the relation of the rule-as-entity to those physical and non-normative referents will be *asymmetric*: the rule will always group all these physical things together by disclosing what was earlier referred to as ‘the rule’s point’. However, this does not work the other way round: those physical entities will not be able to account for the rule’s point independently or prior to the rule. Insofar it is true that on the physical level rules (taken to be something like, say, *tokens of agency*) are nothing more than the physical entities they group together. Yet, if one isolates those things, one loses the rule from one’s sight given the fact that those physical entities cannot account exhaustively for the whole thing (i.e. rule). This happens each time one employs, instead of N(ormative) terms, P(hysical) terms, with the effect that one fails to refer to the rule.

To the second point: Fodor’s idea that all kinds of properties apply to the same things²⁷ corresponds, roughly, to the belief that physical things exclusively form the building blocks of our environment and therefore can accommodate all kinds of properties. This would be taken to entail that some physical things, say ‘red cheeks’, have the property of

25 For a detailed discussion see CHs III and IV, *infra*.

26 These physical entities can be depicted on two levels: on the level of the rule’s creation, as the physical events that lead to a rule’s enactment (as positive law or as valid moral rule within a social practice); second, on the level of the rule’s scope, as the physical events that fall under the rule’s ‘normative field’; at the latter level rules can be taken to constitute ‘tokens of agency’.

27 This belief appears to be very similar to something like Davidson’s so-called ‘anomalous monism’ about mental events. By this term Davidson puts forward the claim that mental events, like all events, are physical, while mental properties are different from and non-reducible to physical properties (in his ‘Mental Events’, in *idem Essays on Actions and Events* (Oxford: Clarendon Press, 1980); Similar seems to be the claim of Stavropoulos about legal and physical properties, when he accepts a pluralism on the level of properties but not on that of events, see Stavropoulos, *Objectivity*, 71, 74; also see the discussion in this chapter, sections 5 and 6, *infra*.

redness but also properties of some non-physical quality as those of embarrassment (psychological property), or of breaking a rule, or of unlawful conduct (normative/legal properties), etc; such a claim sounds rather counterintuitive unless one presupposes the existence of a normative entity that ascribes normative properties to physical things. To that extent a physical entity can be taken to form part of a rule's 'normative field', as indicated earlier. A further case of normative predicates applying to physical things occurs every time that the latter form counterparts of normative entities other than rules like, say, contracts (e.g. the predicate 'valid' to a sequence of physical acts that put together a contract). Admittedly, these distinctions are not very sharp or definitive; one could, anyway, add that normative entities like contracts are constituted on the basis of rules, hence, that there are no normative entities other than rules. What one cannot deny, though, is the existence of any normative entities, by claiming that all predicates apply to physical things, because even in this case the attribution of a normative predicate will involve a rule (which is a normative entity).

ON FRANK JACKSON'S ANALYSIS OF THE SUPERVENIENCE OF THE ETHICAL ON THE DESCRIPTIVE

The story told by the supervenience thesis serves a double purpose: first to safeguard the indispensability of our normative vocabulary while, second, making clear that, at the end of the day, all claims about normative properties are true in virtue of the true claims about physical properties. To that extent supervenience is an elaborate way to guarantee the ontological primacy of physical properties or physical nature without sliding towards reductionism. My premonition is that supervenience cannot save the physicalist programme. In fact its endorsing the relative independence of the domain of normative concepts will, sooner or later, have to lead to an endorsement of normative properties as non-identical to physical properties. In asking whether this is the case I will focus on one of the most well-argued contemporary attempts to account for the supervenience of the ethical on the descriptive (*lato sensu* physical) level, the one put forward by Frank Jackson in his *From Metaphysics to Ethics*²⁸. Jackson's interest is clearly materialist and aims at safeguarding a monism of properties ('every normative property is necessarily identical with some descriptive property'), while admitting an asymmetry (hence an independence) between a normative and a descriptive account of how things are.

28 Vide Frank Jackson, *From Metaphysics to Ethics* (Oxford: Clarendon Press, 1998), Ch 5, 113-138.

This is, roughly, Jackson's account: first he adopts a *global supervenience* of the normative (which he labels 'ethical') on the descriptive. This is captured in the following thesis (S):

(S): For all w and w^* , if w and w^* are exactly alike descriptively then they are exactly alike ethically (where w and w^* stand for different possible worlds).

This thesis he takes to be *a priori* true and necessary. In other words one could rephrase it as:

(S'): w and w^* are exactly alike ethically if they are exactly alike descriptively.

Against the background of (S) he forms the following argument; He takes E to be a sentence about ethical nature in the sense that: (a) E is framed in ethical and descriptive terms, (b) every world in which E is true has some ethical nature and (c) for all w and w^* , if E is true at w and false at w^* , then w and w^* differ ethically. (a), (b) and (c) more or less assume that E is about ethical nature since its ability to be true or false presupposes the existence of some nature of that kind (i.e. ethical) while any alteration of its truth-value must mean that it is possible to modify that ethical nature.

At this point Jackson introduces a premiss which is not as self-evident as he takes it to be. He maintains, namely, that:

(P): ethical nature is impossible without descriptive nature.

and from that premiss he concludes that each world at which E is true will have some descriptive nature which will be fully accounted for by a sentence that contains only descriptive terms. Accordingly, if w_1, w_2 , etc are the worlds at which E is true, then D_1, D_2 , etc. will be the purely descriptive sentences that capture the full descriptive nature of those worlds. Then the disjunction of D_1, D_2 etc. will also be a purely descriptive sentence, call it D . Framed in those terms, the argument proceeds to say that every world where E is true is a world where one of the disjunctives of D will be true, hence E will entail D . And the other way round: every world in which one of the disjunctives of D will be true, will be a world in which E is true, on pain of contradiction with the global supervenience thesis (S) ['worlds that are descriptively exactly alike, are exactly alike in their ethical nature']. The conclusion

of all this is that E will entail and be entailed by D, or $E \leftrightarrow D$. This leads Jackson to infer *that for any ethical predicate there is a purely descriptive one that is necessarily co-extensive*. This amounts further to the claim that ethical properties are descriptive.

After having exposed this strong materialist version of global supervenience, Jackson proceeds to reassure the reader that the identity on the level of properties neither implies that there is no asymmetry between the ethical and the descriptive accounts of how things are nor that the ethical vocabulary is dispensable in practice. Under the asymmetry claim, despite the fact that ethical properties are descriptive properties, it is argued that a rich account of the ethical nature still leaves open many very different possibilities concerning descriptive nature. A full story about the ethical nature of a world *w* is consistent with indefinitely many different descriptive natures. conversely, a full account of the descriptive nature of a world *w* in a way exhausts ethical nature (because of the supervenience of the ethical on the descriptive). On the other hand the claim that the ethical vocabulary is indispensable acknowledges the fact that, when we try to tell the ethical story, it is very difficult to handle (i.e. make any sense) the long disjunctions that Ds usually incorporate without using the ethical vocabulary.

Jackson's attempt to rescue materialism, in the form of a monism of properties, while guaranteeing a relative autonomy of normative nature, in the form of an asymmetry between the descriptive and the normative vocabulary and the latter's indispensability, is by far the most elaborate of its kind. The fact that it fails can only mean that the project is in itself unworkable rather than that we are lacking, as of now, a more complete account. I will try to shed light on the main flaws of Jackson's argument with the purpose of corroborating an older claim of Moore, which Jackson thinks to have dismantled in his discussion. This is more or less the thesis that what is left of language after we cull the ethical terms is inadequate to the task of ascribing the properties we ascribe using the ethical terms (or the *inadequacy thesis*)²⁹. In doing this I will start by exposing a tension within Jackson's own account; this tension will lead to the conclusion that Jackson's effort to reconcile property monism with a relative autonomy of normative discourse is not workable.

The inadequacy thesis

Jackson's account rests, as already indicated, on the premiss (P), according to which ethical nature is impossible without descriptive nature. (P) seems to be not just a premiss for argu-

29 For Moore's claim, see Jackson, *ibid.* 121.

ing further implications of his global supervenience thesis (S), but, moreover, the basis for formulating the very claim of (S). In principle nothing would have been wrong with that, as long as Jackson had provided a justification for accepting (P). But the thesis is accepted, more or less, unargued. But even so, one would not be asking for more, if Jackson's account was a crude reductionist story about normative properties. However, his account purports to take seriously normative vocabulary by allowing first for an asymmetry relation between normative and descriptive concepts and, second, for the indispensability of normative concepts.. At this point the tension arises: to put it in a nutshell, the tension emerges by holding both that:

(P): 'ethical nature is impossible without descriptive nature',
and that:

(P1): 'ethical concepts and descriptive concepts are asymmetrical'.

Let me first expose the tension briefly: P, as the underlying assumption of the global supervenience claim, led Jackson to argue that E (the ethical sentence) entails and is entailed by D (the disjunctive descriptive sentence), or that $E \leftrightarrow D$. Conversely, his asymmetry assumption, captured in P1, led him to argue that 'whereas a rich account of descriptive nature exhausts ethical nature, a rich account of ethical nature leaves open many very different possibilities concerning descriptive nature' or else that ethical nature entails always descriptive nature but not the other way round (E does entail D, but D does not entail E)³⁰. Evidently what seems to be the case here is that, whereas every particular account of E-nature entails a particular account of D-nature, it is not the case that a complete account of E-nature entails a complete D-account. This conclusion constrains the scope of the equivalence statement by taking it to mean that for any E there is an equivalent D which is going to entail that same E (given the E); but not that for any D there is an equivalent E that could be used instead of that D; this Jackson takes to mean that there is no problem with thinking equivalence and asymmetry as being perfectly compatible. But if this is Jackson's story, he has by no means shown that it is not the case that no account of D-nature entails an account of E-nature independently of the latter. By taking E-nature to be 'more specific' than D-nature any D-account of it always rests on an E-account of that nature. In other words the

30 This is the case since the expression 'a rich D-account exhausts every E-account but not vice-versa', can be taken to mean that the set containing all E-accounts is a genuine subset of the one containing all D-accounts.

equivalence $E \leftrightarrow D$ works only when the E is specified. Hence there is nothing to guarantee that any D-account which purports to capture some E-nature will always either fail to do so or to do so in a complete way, unless the relevant E-account is employed. But if this cannot be guaranteed then it is not any longer self-evident that there are no distinct normative or E-properties or, according to P, that ethical nature presupposes descriptive nature³¹. Construed in this way, Jackson's holding both P and P1 might end up supporting the contradictory claim that 'E-sentences and D-sentences are and are not equivalent', depending on the intensity of the asymmetry relation between Es and Ds.

I am inclined to believe that normative or ethical nature does not (always) presuppose descriptive nature. Roughly, there are two levels of arguing for that claim. *On the first level* what is addressed are concepts, predicates, expressions, or else the vocabulary we use when we form E-sentences and D-sentences. On that level the antinomy of holding simultaneously that 'E-sentences and D-sentences are and are not equivalent' can be resolved only by dropping one of the two claims that support it, i.e. either P or P1. In this respect I will try to argue that the asymmetry claim (P1) has to prevail over the materialist claim (P).

The second level concerns the relation between the vocabulary we use in our accounts and the properties we want to account for. Roughly, what I am going to deal with on this level is whether, given the fact that we have endorsed P1, there is a further issue to be addressed before concluding that normative properties are distinct from descriptive ones. There the discussion will investigate whether the relation between E-terms, D-terms and the denoted properties can be reconstructed as a relation between different modes of representation of the one and the same kind/class of properties, where this class will only contain D-properties (this will correspond to the relation between different *senses* and the one *refer-*

31 Timothy Williamson, in his 'Ethics, Supervenience and Ramsey Sentences' (forthcoming in *Philosophy and Phenomenological Research*, 2001) advances a formal point against Jackson's global supervenience thesis: even if we take (S) as saying that worlds exactly alike in X-respects are exactly alike in Y-respects, this does not imply that X-predicates are co-extensive with A-predicates. He rests his case on the observation that (S) attempts to establish co-extensiveness between classes of properties that adhere to individuals *merely by drawing information from comparisons of worlds*. Williamson notes that comparisons of worlds cannot substitute comparisons of individuals. The fallacy attached to such moves becomes clear when we take a class of predicates whose satisfaction is not contingent, like for instance mathematical predicates. Mathematical predicates will be satisfied in the same way in all possible worlds, i.e. all worlds will be exactly alike in respect to them. Now, if in addition to this similarity, says Williamson, two worlds happen to be alike in some other respect, described by, say, velocity predicates like 'fast' or 'slow', then these two worlds will be exactly alike in both their mathematical respect and the velocity respect. Be that as it may, there is nothing in this statement that could support the conclusion that mathematical properties are co-extensive with velocity properties. In the same way, Jackson's (S) does not offer any reason why ethical properties will be co-extensive with descriptive properties.

ence of a term). In this context I hope to show that this reconstruction is not workable because the existence of normative properties rests always on the existence of a class of normative objects, central amongst them being all kinds of action-guiding norms (i.e. moral, ethical, legal and so on). This claim will provide for a robust ontological underpinning of the thesis that ethical nature is possible without descriptive nature.

THE LEVEL OF DISCOURSE

When we look at the level of our discourse, Jackson's antinomical construction can be resolved either by jettisoning the premiss 'E-terms are asymmetrical with D-terms' (asymmetry premiss) or by dropping the premiss 'E entails D and vice-versa' (equivalence premiss)³². By sustaining the equivalence premiss we allude to the robust claim that reduction of E-terms to D-terms is possible and, therefore, we somehow set up a positive answer to the issue of property monism. However, as noted, this is not what one should take as the starting point of the inquiry. Whether the equivalence premiss can be accepted, will mainly depend upon whether the asymmetry premiss allows it (probably by failing itself). That is, one will have to examine the arguments that support asymmetry before alluding to the conclusion that E-concepts and D-concepts are equivalent, hence that there is only one kind of properties available to be depicted by our vocabulary. One further point: taking the asymmetry premiss seriously means that we prefer to postpone an answer about how many kinds of properties there are; it means, moreover, that we choose to make this answer dependant upon the outcome of our investigation regarding the asymmetry premiss. To that extent and with the caveat that we discover that there are no good reasons for accepting the autonomy of E-vocabulary, we have to assume, at least provisionally, a plurality of properties (since if we accept a property monism we would be eschewing the asymmetry thesis from the outset). Besides, since in our every-day vocabulary we clearly distinguish between E and D terms, it is quite plausible to say that those who want to cast doubt upon the asymmetry premiss (and, further, to claim that all properties are of one kind) will carry the burden of proof.

The asymmetry argument

Are E-sentences equivalent with D-sentences? Do E-sentences entail and are they entailed

³² I take the equivalence premiss to be the conclusion of P; in this sense any demonstration of the untenability of the former will apply also to the latter.

by D-sentences (as Jackson believes)? If this were indeed the case the relation between E-sentences and D-sentences would be expressible in terms of the general physicalist identity formula (I.S.). This should not come as a surprise. Both physicalism and Jackson's strong materialist version of supervenience rest on the same unspelt premiss, or the belief that all properties are physical (which is another way to put our materialist premiss P). Any attempt, therefore, to contest that premiss will have to contest the equivalence or identity relation between E-sentences and D-sentences. This can be done by offering some compelling reasons in favour of an asymmetry account between E-sentences (concepts or accounts) and D-sentences (concepts or accounts). All these reasons can be taken together as offering a complex asymmetry argument. I will start by considering an older claim advanced by W. P. Alston³³ and reintroduced by C. Wright³⁴ which aims to show that a biconditional of the form $E \leftrightarrow D$ can only establish an explanatory priority of D-concepts over E concepts and not a ontological one. In this sense, E-concepts will always be picking out in a better way some properties in the target area, a fact that can be employed as proof for the existence of independent E-properties on the ontological level. Hence, there is nothing in the biconditional that makes it compelling to concede that E properties should be D properties. The second part of the asymmetry argument will consist of a few strategies that demonstrate the indispensability of normative concepts in picking out or describing properties in the domain of practical and legal reasoning. Here, any attempt to pick out normative properties by using concepts referring to non-normative properties will fail to properly pick out the right properties in the target area. This will be taken to imply that the right properties are not those that are picked out by non-normative (descriptive) concepts.

The asymmetry of concepts: Crispin Wright's argument

In order to corroborate ontological pluralism it need to be argued that the evoked asymmetry of concepts is more than a possible interpretation within the scope of the equivalence statement that connects normative and descriptive concepts (both in the reductionist argument and in Jackson's supervenience version). This reasoning seems to be supplied by Wright's antireductionist argument concerning properties of numbers³⁵.

33 See his 'Ontological Commitment' in *Philosophical Studies* 9 (1958), as mentioned in Wright, *Frege's Conception of Numbers as Objects* (Aberdeen: Aberdeen University Press, 1983), 32.

34 See Crispin Wright, *ibid.* 25-36. I would like to thank Sean Coyle for drawing my attention upon Wright's argument; see also his PhD thesis, 'On the Foundations of Legal Reasoning in International Law' (unpublished doctoral thesis, University of Glasgow, 1998), Ch. 3.

35 See C Wright, *ibid.* 25-36 (29-32).

Wright takes a class of statements which deals with apparent objects of some kinds: **Q**'s. Further, he supposes that the meaning of each of these statements is such that it can be reconstructed as a statement containing only apparent *singular terms*³⁶ for other kinds of thing. Then the reductionist case is that **Q**-terms are not genuine singular terms, or, on an ontological level, that there are no **Q**'s 'over and above' those entities to which one is committed by using the restructured statements. To put it in more concrete terms: Let us suppose that the **Q**-terms are direction terms of the form 'the direction of **a**', where '**a**' is a term standing for a line. Then it is easy to form identity contexts for these terms of the form:

$$D(a)=D(b) \text{ iff } a//b \text{ (i.e. } a \text{ is parallel to } b)$$

Next we introduce a series of predicates, ϕ_1, \dots, ϕ_n which are direction predicates that apply to the **D**-terms (like 'east-west', 'south-west', etc.). These predicates are introduced in such a way as to observe the condition:

The truth conditions of each statement of the form ' $\phi_k D(a)$ ', are given as those of the statement of the form, ' $F_k a$ ' where F_k is a property of lines.

In other words it is stipulated that a singular term for direction, say 'east-west **D**(a)' is true if and only if $a//EW$, where 'EW' names a paradigm east-west line (hence, is a singular term for lines). As a result, the reductionist claim is instantiated in the claim that 'everything we say...using an apparent singular term for a direction....can be systematically paraphrased without loss of content in such a way that the terms for directions disappear in favour of terms for lines'³⁷. This can be formalised into the following equivalence:

$$\phi_k D(a) \text{ iff } F_k a$$

The biconditional entails that since its two sides are equivalent, then any reference to an object effected by one is also effected by the other, and vice-versa. But is this equivalence enough to support reductionism's identity claim³⁸ that 'there are no **Q**'s denoted by 'direction' singular terms over and above the entities denoted by the right-hand-side singular line

36 Singular terms are the terms that refer to objects other than universals like this, that, horse, etc.

37 Cf., Wright, *ibid.* 30.

38 As the one instantiated in the identity statement, section 2, *supra*.

terms'? Or to put it alternatively, 'why should the priority of the right-hand side be taken for granted'? Wright says³⁹:

Which form of expression has priority? No doubt that the right-hand side has epistemological priority, for it is by reference to it that the meaning of the left-hand side was explained. But which side has ontological priority? The reductionist idea was that since the right-hand side contains no apparent direction-denoting singular term, we can take it that the apparent reference to a direction on the left-hand side is mere surface grammar, a misleading stylistic nuance. But why should we not turn that way of looking things on its head? What is there to prevent us saying that, since the left-hand side does contain an expression referring to a direction, it is the apparent lack of reference to a direction on the right-hand side which is potentially misleading, or 'mere surface grammar'?

It is precisely an argument for ontological priority or identity that both reductionism and Jackson's materialism need and, apparently, cannot establish through equivalencies of the form discussed above. Wright's argument for direction-denoting terms and their corresponding properties can be readily expanded towards normative terms in law and morality: any non-normative or descriptive concepts that were thought to be equivalent to some normative concepts can, at the most, claim epistemological priority but not ontological priority. With this move reductionism in the normative realm is seriously undermined, since it is not as obvious any longer that normative nature is impossible without descriptive nature.

The indispensability thesis

After having established the fact that the equivalence/identity formula cannot necessarily imply an ontological priority of descriptive properties, I will try now to show in more detail why the asymmetry between E-sentences and D-sentences entails a pluralism on the level of properties. Since I take the premiss P to underlie both Jackson's version of supervenience and the reductionist account, my discussion will be directed against both of them. Further, the discussion will be conducted in the domain of law and its main endeavour will be to show that in that domain reductionist moves fail for the same reason: whenever, in order to refer to normative phenomena, we employ a descriptive concept in the place of a normative concept, we pick out a descriptive property that is not able to account for the same phenomenon without making reference to a property picked out by a normative concept⁴⁰. This

39 Cf., *ibid.* 31-32.

40 For a similar formulation, see Stavropoulos, *Objectivity*, 71.

will entail that the relation between descriptive and normative properties is *asymmetrical* and, moreover, that *pluralism* on the level of properties is a compelling alternative.

In law and morality the target of reductionism are normative properties and, in a derivative way, normative (legal/moral) concepts. A typical reductionist move would attempt to substitute in normative concepts, concepts that carry no commitment to normative properties, on the assumption that the latter are identical with some descriptive non-normative properties. Here the reductionist will mainly try to establish the existence of some non-normative property that is nomologically⁴¹ coextensive with each normative property. Against this general form of reductionism one can put forward the general objection of *multiple realisation*, or the claim that there is no unique, individual non-normative property corresponding to every normative one⁴². This objection can be met by the reductionist by pointing out that there is not just an individual reducing⁴³ property but that the reducing property is generated on the basis of a disjunction of the different kinds of non-normative properties on which the normative property may rest. In this case the anti-reductionist objection has to be modified in the direction of pointing out that not *any disjunction* can form the basis for a genuine reducing property. In particular, in order to be able to perform a proper reduction, the disjunction should not contain simply a list of lower-level properties, where the criterion for deciding what should be included required the employment of higher-level normative concepts. In other words for any disjunction-based reduction to be successful, it should not be shapeless from within the resources of the lower-level theory (the *shapelessness objection*)⁴⁴. The shapelessness objection is usually supplemented by the further requirement that the reducing property should be able to do the explanatory work of the property it purports to reduce. In the case of legal and other normative properties this explanatory work will, clearly, be non-casual. The anti-reductionist claim here is that the higher-level normative properties are indispensable since they provide explanations that depend on normative relations which cannot be captured by the physical vocabulary that cannot pick out anything but physical kinds. Hence the reductionist move will either end up

41 As Stavropoulos says, 'For coextensiveness to be nomological, there must be a law correlating the properties corresponding to two sets of concepts expressible in those terms, i.e. describing one class of properties by the concepts of the reducing set and correlating that to the other class of properties described by the concepts of the set to be reduced, and justifying the claim that the correlation expresses a law of nature', in *Objectivity*, 71. This law that correlates the properties (events or entities) over the predicates can be readily taken to have the form of the aforementioned identity statement (I.S.).

42 Vide Charles and Lennon, *ibid.* 7-8.

43 By 'reducing property' I refer to the property that is used in order to perform the reduction.

44 *Ibid.* 8-9.

using the very concepts it attempts to reduce (circularity) or will fail to pick out the properties aimed at in the first place (because of the asymmetrical relation between the properties/facts)⁴⁵.

Of the above kind will be any attempt to reduce the normative concept of 'obligation' by assuming that it picks out properties which are identical to some psychological properties (fear or other compulsive feelings) or physical events (e.g. movements). It will either have to resort back to 'obligation'⁴⁶ or will end up picking out irrelevant properties like 'being obliged'⁴⁷ or 'being in fear', etc (shapelessness objection). Similar are the cases of American Legal Realism (ALR)⁴⁸ and the Command Theory of Law (CTL) in respect to the concept of law. In the former, the concept of law is reduced to what the judges say it is, whereas in the latter to the Sovereign's commands and the habit of obedience thereof. In the case of ALR the reductionist move aims to reduce legal properties by substituting in their place properties relating to the judges' behaviour. The move fails in the familiar double way: either the concepts employed pick out behavioural, hence, non-legal properties (since those two classes of properties are not identical); or the Legal Realist has to recur to legal properties as being decisive for the determination of the concept of law (shapelessness objection and failure to perform the required explanatory work); Hart's critique of ALR seems to substantiate precisely this point by demonstrating that judges can go wrong in their decision⁴⁹: their going wrong is only possible if legal concepts refer to genuine legal properties which constrain judicial behaviour. In the case of the CTL rules are reduced to commands that are backed by sanctions and are usually obeyed. The attempt to reduce legal concepts by assuming an identity between legal properties and some other, as it were, empirically observable properties alluding to a class of social facts cannot, again, be carried through as, sooner or later, the account will have to re-introduce legal concepts that depict genuinely legal properties; otherwise, it will fail to capture the phenomenon of law, as the discussion in the last chapter tried to establish (failure to perform the required explanatory work).

All the above cases point towards something like an *indispensability thesis*, or the

45 To rebut any connotation of circularity the argument could be rephrased as involving a proof that it would be impossible to reconstruct adequately the normative language-game of law unless one presupposes irreducible normative terms and predicates. I owe this refinement to Carsten Heidemann.

46 This is similar to the circularity that ensues when trying to identify 'French citizen' in a France-neutral way (see Stavropoulos, *Objectivity*, 71-72.). In that case the property of 'being French' is as irreducible as the property of 'being under an obligation' in our example.

47 See the discussion in chapter I, *supra*.

48 For the reductionist program of Legal Realism, see the discussion in Stavropoulos, *ibid.*, 72-73.

49 *Ibid.*, 72.

thesis that normative predicates and concepts are indispensable in order to refer to normative properties and entities. The indispensability thesis implies, in its turn, the impossibility of eliminating evaluative (legal/moral) concepts through non-evaluative ones a fact that, further, suggests that the relation between them is, to say the least, asymmetric. This asymmetry seems to emanate from the autonomy of the normative concepts' referents, i.e. normative properties. This autonomy can be readily taken to endorse, beyond a mere pluralism of properties, a pluralism of events, facts and objects⁵⁰. Such a pluralism would accept entities like rules (legal and moral) and properties or events like 'something being right, lawful, criminal, etc'.

Before the discussion moves to the level of properties I would like to briefly refer to an objection that could be raised from Jackson's account. Jackson might claim that he never presented the antinomy between the equivalence premiss and the asymmetry thesis in the sharp way that I took him to have done. In fact, his objection might go on, he made perfectly clear that his supervenience thesis entails that the normative supervenes upon the descriptive and not vice-versa. In other words the transcription of S to S' as well as my reading of his equivalence relation between E-accounts and D-accounts as an identity statement are seriously flawed. Instead what he really did all the way through was to endorse asymmetry between the E-concepts and the D-concepts. It is, besides, for this reason that supervenience had to be evoked in order to account for the asymmetrical relation between the two kinds of concepts. To such a possible objection one could make the following comments: first despite his verbal commitment to the asymmetry of the discussed concept Jackson is bound to undermine it since he strongly subscribes to the premiss that 'ethical nature is impossible without descriptive nature' (the aforementioned P-premiss). In doing this his supervenience thesis does not (or cannot really) seriously differ from a reductionist thesis about normative properties. This is clearly demonstrated when he formulates the thesis 'E entails and is entailed by D', or $E \leftrightarrow D$. This very formula refutes Jackson's claim of asymmetry in a quite straightforward way. Of course it would produce a rather spectacular effect if Jackson could show that despite the asymmetry being in place, ethical/normative nature cannot exist with-

50 This claim seems to be more radical than the one of Stavropoulos, who restrains ontological pluralism at the level of properties (see his *Objectivity*, 74; also see footnote 27, *supra*). Pluralism on the level of events/facts and/or objects seems to be consistent with an ontology that does not take the world as being put together exclusively by matter, but allows normative entities to feature as components of its fabric. This ontology is particularly favoured by a Kantian metaphysics, in which reality is revealed within judgements; see the discussion on the Kantian strategy and on realism/anti-realism in Ch III, *infra*.

out descriptive nature. But my point was precisely that those two theses are incompatible: once asymmetry is in place the reductionist formula $E \leftrightarrow D$ cannot hold⁵¹.

THE LEVEL OF PROPERTIES

The discussion until now has roughly assumed that terms and properties stand in a one-to-one 'correspondence'. The reason for this was, as noted earlier, that if one is not allowed *ex ante* to assume that all ethical nature boils down to being descriptive, then one has to take concepts to be referring to distinct properties. The analysis showed further that there are good reasons for treating normative concepts as being asymmetrical to descriptive concepts, with the result that for any normative concept there is no co-extensive descriptive concept. Both the asymmetry argument that was based on Wright's analysis, and the indispensability thesis amounted to the claim that normative concepts are indispensable for picking out some properties that cannot be picked out by any descriptive concept. To that extent, the indispensability of normative concepts and their asymmetry to descriptive concepts was based on their ability to pick out properties that no descriptive concept is able to pick out. As a result the main assumption of the normative concepts' correspondence with normative properties has been corroborated.

Before concluding that normative properties are distinct from (in the sense of being over and above) descriptive properties, I want to consider one more possible objection that could undermine that conclusion. The objection says that despite the fact that, on the level of discourse, normative concepts are distinct from descriptive concepts, things look very different on the level of properties, or rather, that of the relation between concepts and properties⁵². On that level what we have is just one kind of properties, namely descriptive properties. The claim is based on the following analogy. Concepts are taken to occupy the level of Fregean Senses (*Sinne*) whereas properties that of Fregean Reference (*Bedeutungen*)⁵³. Accordingly, it is perfectly possible (moreover necessary) that an E-concept is distinct from a D-concept, albeit both pick out (or correspond to) the same property which is more likely to be a descriptive rather than a normative property⁵⁴. In this case E and D be-

51 Even if one, like Jackson, models D as a huge disjunction in order to allow for $E \leftrightarrow D$ to work, the *shapelessness objection* will block the equivalence.

52 This objection is probably the fundamental idea behind reductionism.

53 The Fregean terminology is clarified in fn. 1 in this chapter, *supra*, and in Ch III, *infra*.

54 This is probably the most uncontroversial part to concede: given the fact that property monism can be established, only a few people would argue that all properties are of the normative kind. Having said that, there are representatives of Neo-Kantianism who tender the idea of a monism based on nor-

have like two distinct senses, S1 and S2, of a word that correspond to the same reference R. The objection clearly purports to undermine the conclusion that was based on the asymmetry argument. The asymmetry discussion tried to establish the existence of more than one kind of properties, by arguing that normative concepts are indispensable because they pick out properties that descriptive concepts cannot pick out. The objection starts by conceding the point of the indispensability of normative concepts, albeit on totally different grounds: normative concepts are indispensable owing to their different mode of representation of a property (which can always be represented differently by a descriptive concept)⁵⁵. In other words, concepts of different levels (normative/higher-order or descriptive/lower-order) need not be but different modes of representation of the same property, in the same way that distinct senses correspond to the same reference. This objection, call it *the mode of representation objection*, is quite serious and certainly calls for a more direct defence of the plurality of properties. In the previous section the plurality of properties was, in a way, established only indirectly, as a consequence of the fact that normative concepts seem to pick out something which is not the same as the thing that is picked out by descriptive concepts. Now, it might be necessary to argue that that thing which is picked out by normative concepts is not just ‘an angle of representation’ but a genuine property. Having more or less established that, in any case – be it either genuine property or mode of representation – what is picked out by E-concepts is different from what is picked out by D-concepts, the further demonstration of the E-concepts’ picking out a genuine property will lead to the conclusion that there are E-properties which are distinct from D-properties. This will be enough to support a property pluralism.

The mode of representation objection can be undermined by showing that the analogy it alludes to, does not work. Specifically, if it were true the different concepts stood in a sense-reference relation to a property, then this would contradict some of the conclusions that were established through the asymmetry argument and the indispensability thesis. That is, if E and D stand to a property P in the same relation that S(ense)1 and S(ense)2 stand to the reference R, then E and D should be interchangeable at will. Because any S1 and S2, notwithstanding their ability to correspond to different aspects of R, can at any time be employed interchangeably without failing to refer to the same R. However, this is far from

mative properties, along the following lines: ‘an object is red if and only if one *should* apply the predicate ‘red’ to it’. I am indebted to Carsten Heidemann for drawing my attention upon this possibility.

55 To that extent the objection seems to be closer to the thesis that earlier was refereed to as *ascriptive*

being the case in respect to E-concepts and D-concepts. Whenever one employs the D-account 'piece of paper bearing signatures....etc.' certainly fails to refer to the same thing as one does by employing the E-account 'the contract between the parties X and Z'. Moreover, the two accounts are by no means interchangeable without failing to achieve a complete description of the properties in question. And this failure cannot be cured by supplying the kind of empirical information that would associate two distinct senses. What I mean is this: it is not that the failure has to do with the fact that we don't know that an E (concept, account) refers to the same thing as a D, in the way that people in older times did not know that 'evening star' and 'morning star' had the same reference. In the latter case, it is true, the two different senses appear to be conveying knowledge about two different things. However, as soon as it was established, through astronomical observation, that both 'evening star' and 'morning star' refer to the same thing, the difference between the two senses became perspectival. Conversely, our knowledge that a contract x is embodied on a piece of paper cannot cure the failure of referring to x by employing terms that refer to the material paper.

The asymmetry between D-concepts and E-concepts generates a further criticism to the mode of representation objection. As argued before, E-concepts might prove to be indispensable in the description of some domain of normative discourse or in handling long D-disjunctions. Once though this point is taken, and Jackson certainly would agree with it, it looks rather odd to take Es and Ds to relate to each other as two senses, S1 and S2, that correspond to the same reference. Taking them to do so would amount to accepting that S2 is a mode of representation which rests on S1. However, the sense of the term 'evening star' does not seem to rest in any way on the sense of the term 'morning star'.

Accordingly the difference between normative and descriptive concepts is not just perspectival. Normative concepts refer to a different kind of properties than descriptive concepts do. Having said that, one might object that even in that case normative properties are not autonomous because they 'sit on top' of more basic descriptive properties which at the end of the day determine the truth or falsity of our descriptions and explanations of how things are. This objection could be taken to follow from the background belief that all properties apply to physical objects/entities whose basic structure consists in physical properties and can only be captured in descriptive terms. I will attempt to refute the objection and its background belief by arguing that there are at least three kinds of objects/entities that are

supervenience. See section 3 of this chapter, *supra*.

specifically normative: normative properties, normative entities (like contracts), and norms on whose basis properties are ascribed.

The variety of Normative Nature

Let us for a moment suppose that normative or E-properties do indeed 'sit on top' of other descriptive properties the way supervenience wants them to do. This cannot readily be taken to imply that those properties cannot be attributed as distinct properties to certain objects/entities of the environment which are located in space and time⁵⁶. The reason for that is their ability to provide for explanations that cannot be supplied by any other descriptive property. To that extent, normative properties are not very different from colour properties. Being red might indeed 'sit on top' of more fundamental properties of spacio-temporal objects which are properly described only by physics. Be that as it may, 'being red' is a distinct property that provides for a distinct explanation of how things are, in a way that physics cannot do. This is so because 'being red' is not analysable in more basic physical properties. The same is the case with normative properties: they are indispensable in explaining some features of things which cannot be captured by attributing to them other descriptive properties. Now, one might ask, to what extent does their explanatory role vest normative properties with ontological independence? It is true that by acknowledging the indispensability of normative properties one has not, as yet, decided about their ontological status. In fact, taking E-properties to 'sit on top' of other more fundamental descriptive properties could just be implying that there is still only one class of things, namely physical things existing in space and time, to which all properties apply. There are, however, two further reasons that block this line of reasoning and, instead, force us to account for normative properties in a way that would broaden our ontological commitment towards including normative objects and entities. First, the fact that normative properties, like all properties, are themselves abstract objects of normative quality⁵⁷. Second, and more important for the present account, normative properties can only be attributed if one presupposes the existence of a class of normative objects and/or facts. This class will typically include *legal norms*, both as rules and principles, as well as some other objects, like for instance 'contracts', that, nevertheless, are constituted on the basis of some legal norm.

It is indeed a bold claim that I am making here and it will be qualified a lot more in

56 Vide Donald Davidson's account in his recent 'Objectivity and Practical Reason', in Edna Ullmann-Margalit (ed), *Reasoning Practically* (New York: Oxford University Press, 2000), 17-26.

57 See Davidson, *ibid.*, 23.

the course of the dissertation. But the idea that it rests on is rather simple: normative properties are attributed to (physical) things not solely on the basis of '*how things are*', but predominantly on the basis of how things '*should be*'. The '*should be*' modality is usually the content of a norm. Therefore, normative properties are 'introduced' into the physical environment in connection with norms which are normative entities. To that extent anyone ~~one~~ who is not a crude eliminativist and accepts the explanatory role of normative properties and their concomitant asymmetry towards descriptive properties, needs to accept the existence of some normative entities. That has to be the case independently of whether one wants to attribute to normative properties the status of ontological independence. To put it slightly differently, even if one, like Jackson, would rather conceive of normative properties as identical with some physical properties, one would still have to admit the existence of some other normative entities, i.e. norms. But if one takes the step towards admitting norms as distinct normative entities, it is not easy to reconstruct them as not signifying such entities. A reductionist move on the level of norms would have to undertake an analysis of legal rules and principles into some class of properties that would be easy to reduce anew to a class of non-normative properties. For example: instead of admitting the existence of a rule about the obligations originating from a valid legal agreement between two parties (a contract), the reductionist would like to say that the rule is nothing but the *ex post* collection of the different obligation-properties (E-properties) that anyway apply on some physical entities (the parties). Clearly this move fails as any attribution of those properties will require the existence of the relevant rule.

Conclusion

The reductionism discussion showed that there are no non-normative expressions that are co-extensive to normative expressions (concepts, predicates). This was taken to imply that, on an ontological level, those expressions correspond to properties which are genuinely normative and irreducible to any co-extensive descriptive properties. The autonomy of normative properties suggested the admittance of normative objects/entities that cannot be reduced to any physical objects (or bundles of descriptive properties). In this last respect, the anti-reductionist argument did justice to Hart's claim that rules are something beyond and above, an *aliud*, to a mere aggregate of physical facts of some sort (social and/or psychological).

But Hart's discussion has also suggested that this *aliud* rests on an internal or evaluative aspect pertaining to rules. Insofar, to put it figuratively, the *idiosyncratic nature*

of legal discourse seems to consist of two distinct aspects: an ontological and a practical/evaluative. Hence, any attempt to offer a complete account of the legal phenomenon will eventually have to address both aspects as well as the interconnections between them. For the moment I will postpone a discussion of the *issue of normativity* and, instead, spend some time (the remaining of Ch II, CHs III and IV) on developing an appropriate account of *law's ontology*, as the prerequisite for any antireductionist treatment of legal discourse. Later (CHs V and VI) I will attempt to supplement the ontological account with an account of *law's normativity*.

In the remaining of the chapter I will develop the main tenets of the philosophical framework in which the account of law's ontology will be given. This will consist in an account of the connections between thought (language), the mind and the world which will advance the thesis that *semantics-exhausts-ontology*. This will roughly be taken to mean that an account of what exists (i.e. in terms of physical entities) in the environment, can instead be given through an account of the semantic structure of our language (or the *grammar of thought*). Another way to put it, is to say that a meaningful or coherent account of the material 'building blocks' of the world requires us to presuppose, *a priori*, a normative pattern (grammar) that 'maps' the world in its order. Then, all we need to do in order to account for the ontological categories are we committed to is to consult this grammar (this is going to be labelled the *semantics-exhausts-ontology* thesis).

A FIRST ENCOUNTER WITH THE METAPHYSICS OF CONTENT

The fact that we possess mental content enables us to acquire knowledge about the world, to draw conclusions about the past, plan our behaviour for the future and, generally, appreciate the patterns that underwrite the world and the behaviour of other human beings. In other words, content gives us both knowledge and intentionality. For this reason, any talk about content will have to elucidate the connections between the mind (thought, language) and the world, in a way that can best account for meaningful human behaviour. In my discussion, I will take the philosophy of content to occupy a central position or, even, to be prior to the other domains of the philosophy of mind, ontology and metaphysics. Following many philosophies after the linguistic turn, I take priority of content to show that the query into the patterns of the world and the mind is only meaningful through (or mediated by) the explication of the patterns of thought and content. On a first judgement the priority of thought and content follows from the trivial fact of the existence of human intentional behaviour. Any

attempt to comprehend this behaviour as being intelligible (or rational), will lead to the endorsement of some sort of *intentional realism*⁵⁸, or the idea that intentional states (e.g. beliefs) are real. In a further stage, it will be shown that those real intentional states are mainly embedded within linguistic structures. To that extent the discussion of content will turn into a discussion of the patterns of propositional content. The latter will, further, reveal something like an *a priori* (logical) grammar. I will take grammar to indicate more than the formal-syntactic grammar that linguistics deals with. 'Grammar', in the context of the present discussion, will stand for the *normative patterns* that regulate thought (within language) and whose existence can be demonstrated transcendently.

Now, because of the assumption of the priority of content, this grammar is not going to be merely a grammar of thought, but, what's more, it is going to be taken to map the whole domain both of metaphysics (ontology) and the philosophy of mind. Questions and answers about what objects or facts exist, or about which brain states and events are brought about, are all answerable to the normativity of the grammar of thought. This is not to say that what exists in the mind/brain⁵⁹ and the world, exists in virtue of the grammar of thought (idealist presumption); the claim is, rather, that the patterns of grammar are (transcendentally) necessary in order to map the mind/brain and the world.

The ensuing discussion is going to tackle the issue of the priority of intentional content and its underlying grammar by tacitly endorsing the structure of a two-stage transcendental argument:

P1: (intentional) human behaviour is a fact.

P1': for intentional behaviour to be possible, one has to assume the existence of intentional states.

C1: there are intentional states (intentional realism).

P2: there are intentional states (C1).

P2': for intentional states to exist, they have to exhibit certain patterns of logical structure (grammar).

C2: there is a logical grammar of thought.

58 The term comes from Luntley, *Contemporary Philosophy of Thought and Language* (Oxford: Blackwell, 1998), 4. The use of the concept 'realism' in this context serves merely the purpose of stating that intentional or mental states or phenomena exist as distinct from brain states.

59 The physical aspect of the mind (brain) can readily be taken to be part of the physical world. The non-physical part of the mind apparently contains the principles that put together the *a priori* grammar

Alternatively, one could take the fact of the existence of human intentional behaviour as already containing the claim of intentional realism about beliefs and other states, thus simplifying the structure of the transcendental argument. This would probably be relatively uncontroversial in the face of a widespread agreement on the issue amongst philosophers⁶⁰. In either case, the discussion will have to clarify two issues: *first* the 'self-evident' reality of intentional states; and *second* the nature of the underlying grammar.

The shift from the philosophy of mind to the philosophy of content

Intentional realism is the view that there is such a thing as intentional content⁶¹. This claim enjoys the status of a necessary presupposition 'projected' upon the trivial fact of the existence of human behaviour that interrupts, as it were, the causal flow of the physical universe (see the given premiss P1). It is this necessity to account for human behaviour coherently or meaningfully, as an-intervening-in-the-world factor, that forces on one some version of realism about thoughts, beliefs and other intentional states. If, in other words, one wants to account for human behaviour then concepts like 'believing that...', 'hoping that...', or 'wishing that...' cannot be eliminated from one's explanation.

Put in those terms, the claim of intentional realism, robust as it may be, does not proceed to say how content is individuated. That is, it does not prejudge the way one is going to account for what content is, or what kind of entities beliefs and other intentional states are. It does, though, pose an outer limit on what content can be: namely that however content is going to be individuated it has still to be related to the explanation of human behaviour. That is no less than saying that content has to be able to support a rational account of human behaviour⁶². This constraint adds to the initial need to provide for an account of behaviour the further requirement of rationality: content is necessary not only in order to understand the way we experience the world, but also in order to rationally account for our behaviour (or intervention in the world); whereas 'experience of the world' might be taken to constitute something like the passive side, or the information-background of behaviour, the rationality requirement seems to directly flow from focussing upon behaviour as such. Thus, both claims incorporated into the doctrine of intentional realism are still within the

of thought.

60 See Luntley, *ibid.* 3-11.

61 Cf. Luntley, *op. cit.* 1-11.

62 *Ibid.* 4.

triviality scope⁶³ of the initial transcendental argument (the fact of human behaviour).

As soon as one endorses the two minimal requirements of intentional realism, emanating from the fact of the existence of human behaviour and its impact upon the causal network of the world, one has a response to the so-called *constitutive task*, or the task of characterising the role of content in rationalising explanations of behaviour. Yet, what one still lacks is an answer to the way of individuating content. This seems to fall largely under the subject matter of the so-called *engineering task*⁶⁴, or the task of connecting the material side of content, i.e. brain states, with the environment by using causal concepts. Strictly speaking, this second task is not on the same level of neutrality as the first, the constitutive task; in fact it presupposes that one has already opted to individuate content in a specific way, namely by holding that content is individuated by entities which are independent of the environment and which possess some (mysterious) representational abilities.

Be that as it may, I take the engineering task to express, in a more general way, the important task of the connection between thought and the world which is independent of the method of content individuation. Admittedly, if one treats this problem as an ‘engineering task’ that postulates the re-connection of intentional content with its environment through causal concepts, one is already ‘biased’ as to the method of individuation of content. Conversely, the ‘engineering task’ can take a completely different content if one individuates content in a *non-representationalist* way. In all, whichever way one chooses, the issue of the connection between thought and the world will be present; what is not obligatory, however, is that it will always take the form of a *physicalist program*. In fact, I am going to argue that the more general issue that the ‘engineering task’ addresses can be better resolved if one avoids representationalism and the affiliated forms of physicalism. Since the problem of representationalism is going to reappear later⁶⁵, I am going to offer a brief account of the way representationalism individuates content, with the aim of demonstrating some serious problems whose need for a solution will lead the discussion to a non-representationalist model of content individuation.

63 With this term I refer to the starting premiss of any transcendental argument which has to be a fairly uncontested, or trivially apparent, fact.

64 Vide Luntley, *ibid.* 7.

65 The problem of representationalism is going to reappear in connection with Lockean Ideas and other mental intermediaries in the discussion of Wittgenstein’s rule following considerations; vide Ch VI, *infra*.

Representationalism has, by and large, been taken to be synonymous with intentional realism. Representationalism responds to the *constitutive task*, or the task concerning the intervention of human behaviour in the causal flow of the world, by assuming the existence of content-possessing entities of some kind that are independent from the environment⁶⁶. Propositional attitudes like ‘believing that’, ‘hoping that’, ‘wishing that’, etc. are attitudes towards such entities. This ‘reification’ of content is achieved through entities like, say, the Platonic or the Cartesian Ideas. Clearly, the claim of the existence of independent entities is a powerful expression of the idea that content is self-standing and necessary in order to account for human behaviour: it rests upon the simple thought that something can be conceived as intervening in the flow of the world only if it is independent of it. The more independent this ‘something’ is, the better is the explanation it offers. And indeed one could hardly imagine anything more independent than entities that are revealed by a mysterious faculty (Platonic Ideas), or by introspection (Cartesian Ideas). Alas, the aftermath of those strong claims is the impossibility to establish any connection of those entities with the world, since in order for them to be representations of the world, they need somehow to be in some causal relation to it: hence, the ‘engineering task’ is doomed to fail from the beginning, as there is no way of offering any explanation that would connect these non-physical entities with the environment on an account that would be in accordance with the way the world works, that is, without assuming an obscure metaphysics. If, however, the engineering task fails, so does the constitutive task, for explanations of human behaviour can no longer be modelled in a satisfactory way.

Intentional realism, in the form of representationalism, has more chance to survive if one is able to provide an account that respects the engineering task by endorsing a physicalist ontology. This is the road that modern representationalist theories take. Here, thought is individuated by entities which are characterizable independently of the world, albeit, they can be connected to it causally. These entities are perceived as intentional states (beliefs, wishes, desires, etc.) that intervene between the environment and our behaviour. These states feature in causal explanations of behaviour while, on the other hand, they are themselves causally connected with what they stand for (bits of the world). In order to be able to engage into causal relations, intentional states must be shown to pick up the physical enti-

66 Vide Luntley, *Contemporary Philosophy*, 7-11.

ties postulated by the engineering task, namely brain states. Thus, much of the success of the physicalist program depends on the possibility of reducing belief or other intentional states to the level of physical brain states.

Disregarding objections stemming from arguments that block the possibility of reduction, as they were discussed earlier⁶⁷, the program of physicalism seems to undermine intentional realism by subordinating the constitutive to the engineering task. Even in their occult metaphysics, Platonic and Cartesian Ideas capture the central claim of the constitutive task which is the 'reification' of thoughts as normative entities that can account rationally of behaviour. Conversely, physicalism, driven by the fear of succumbing to idealism, or to an obscure metaphysics, seems to arrive at the other extreme: by focusing upon the engineering program it seems to bestow explanatory priority on the reducing brain states over the normative concepts (beliefs, etc.): since it is more important to have entities that can feature in causal explanation, one should be able to disguise the normative states as physical states. After this move has been performed the constitutive and the engineering task can no longer be treated as being on a par. As a result, some amongst the physicalist philosophers choose to abandon the program of preserving both tasks and, instead, embark on an eliminativist program that gives up the constitutive level⁶⁸. Yet any attempt to get rid of the latter is bound to bring about the cancellation of intentional realism.

But is the dilemma compulsory? Is it true, in other words, that one can either hold intentional realism to be true, or undertake the task of naturalizing content, but not both at the same time? On the assumptions of representationalism, this seems to be inevitable. However, besides representationalism there seems to be one more way of individuating content which might be able to preserve both the intuition of intentional realism and the idea that thought has to fit in the physical universe (naturalization of content).

The priority of the normativity of thought

The main problem of physicalism becomes apparent with the reductionist move. This move, besides being powerless to establish the priority of brain states over normative states, demonstrates a further deficiency. In a counterintuitive way, it contravenes the rationale of its employment: reduction is allegedly employed in order to save the autonomy of thought by offering a workable, that is naturalised, explanation of human behaviour. Despite its noble

67 Vide, section 3, supra.

68 Amongst those philosophers count Paul and Patricia Churchland and Stephen Stich in his earlier work. See Luntley, *ibid.* 8, 9.

intentions, it ends up declaring that intentional realism, or the normative autonomy of thought, is untenable. The roots of this failure lie deeper, though. They lie in the whole idea of representations as being independent of what they represent (the world)⁶⁹. The reification of thought through entities that possess representational powers requires such strong assumptions that it ends up undermining the normativity of thought and the idea of intentional realism. The way representationalism is set up yields an understanding of the constitutive and the engineering task as being antithetical: either thought is independent and cannot be analysed (or reduced) to causal categories, or thought has no independence and is understood only through the categories of physics; in the first case there is no hope of ever establishing any connection between thought-as-blueprint and the environment whose blueprint it is. In the second, there is no way of adequately explaining human behaviour. In fact eliminativism, or the full reduction of the constitutive level, shows precisely the *aporia* connected to the dilemma. As soon as one realises that the categories of thought cannot be reduced to physics, one prefers to ignore them altogether, as being unreal, or instrumental⁷⁰ and, instead, concentrate on what is palpable: the picture of the world through our best scientific theories.

These thoughts point *e contrario* towards the ‘ingredients’ that could produce an alternative viable account that would be in a position to uphold the intuitions of both the constitutive and the engineering tasks. Such an account would have to rescue the normative level of thought while giving a description of how thought fits in the world without presupposing reduction. Clearly, against a representationalist background, it might seem extremely difficult to combine these requirements. Things seem totally different if one discards the notion of representation and alludes to the idea of a non-reductionist theory of naturalised content. Such a theory would rest on the assumption that the whereabouts of the normative entities of the constitutive level do not need to be remote from their worldly surroundings. Put in those terms, a theory of content will still be normative, while conceiving content as being shaped in the world. At the same time, it will hardly need to appeal to any kind of reduction of content-concepts, precisely because content will have already been conceived as being in touch with the environment. Obviously, reductionism seems to wither away, as soon as representations are disposed of.

69 See also the discussion of the role of representations as *ultra-interpretations* in the context of meaning and understanding, Ch VI, *infra*.

70 This is a more subtle version of eliminativism in which the constitutive level is not fully eliminated but treated instrumentally as a way of talking that one finds useful to employ, which, though, carries

A non-reductionist, naturalized theory of content exploits the impossibility of analysing the normative concepts of the constitutive level in causal terms, by endorsing the thought that the constitutive and the engineering tasks stand side by side⁷¹. Such a theory contemplates the possibility of autonomous intentional content conceived in a way that is not cut off from its environment. In doing so it endeavours to show that thoughts are not reducible to causal terms, i.e. they are autonomous, while, at the same time, they are not mysterious entities isolated from the world. Such a view establishes the autonomy of the normative constitutive level of thought through transcendental argument, while it proceeds to declare that the constitutive categories are characterizable only in an externalist way, that is by showing that the natural world is necessarily implicated in the constitutive account of content⁷². By performing this double move, the non-reductionist naturalised theory of content achieves threefold: it rescues intentional realism; it holds to the idea of a naturalized intentional content; it reconciles the constitutive with the engineering task by rejecting reductionism. In fact, the third achievement is made available because naturalized content is compatible with a causal account of the world. What it does not any more require is a reductive account of mental content in causal terms, since, from its constitution, it is involved in the world.

AN ANTI-REPRESENTATIONALIST THEORY OF CONTENT

A non-reductive theory of content, like the one just sketched, can be taken to be of Fregean inspiration⁷³. The most central claim of such a theory is that it identifies the structure of thought with the structure of language. This claim is not unqualified; it aims to capture the fact that the structure of thoughts can be, on the whole, individuated through linguistic structures⁷⁴. As such it is narrower than the claim that the structure of language is constitutive of the structure of thought, or that language exhausts thought. The investigation into whether this stronger claim is true or not, need not occupy us in the present context. Instead of offering a definitive answer as to which is prior, language or thought, one could charac-

no real significance. See Luntley, *Philosophy of Thought*, 8-9.

71 Along these lines evolves the account of content offered by Luntley, *ibid.* 11 n.

72 Vide Luntley, *ibid.* 10, 11.

73 The term is used by Luntley (*ibid.* 11 n.) in order to summarise externalist, non-reductive theories of content whose roots lie in the work of Gareth Evans and which were further developed by Lynne Rudder-Baker and A. Clark. Similar ideas are to be found in the work of D. Davidson, as well as in more contemporary philosophical work with Davidsonian aspirations, like that of S. L. Hurley (see the preface of her *Consciousness in Action* (Cambridge, Mass: Harvard University Press, 1998)).

74 See Luntley, *Contemporary Philosophy*, 11.

terise the connection between the two in a more neutral way, by alluding to something like *the semantics-exhausts-ontology thesis*⁷⁵. This thesis contends that, to the extent that the world (ontology) can be captured through the structure of thought, it can also be captured through the structure of language (semantics), avoiding thus a direct confrontation with the language/thought issue.

The semantics-exhausts-ontology thesis substantiates the idea that the study of the structure of thought precedes that of the structure of the world or, more cautiously put, that the 'burden of proof as to what exists' is inverted between semantics (thought) and ontology (the world); it says, more or less, that one could come to know what exists by attending to the structure of thought rather than by scrutinising the molecular structures of Matter. To that extent, the Fregean strategy presents itself as an alternative to eliminativism and reductionism in general. Eliminativism, as discussed earlier, trusts physics and its picture of the world to such an extent as to postulate the harmonisation of the theory of content with an ontology deriving from physics; in doing so it fails to account in a satisfactory way for the rationality of human behaviour. Conversely, the Fregean strategy exploits the *a priori* necessity of thought for the explanation of behaviour and goes on to proclaim that semantics, as a level of individuation of thought, comes in importance before ontology in the process of content formation. This comparison shows, in a rather instructive way, that if one wants to rationally account for behaviour, one has to admit the priority of thought and the concomitant priority of semantics.

'Semantics' in the Fregean strategy stands for that theory of content which is designed to make, in the best way, rational sense of behaviour⁷⁶. In this sense it is juxtaposed to ontology as a theory of the scientific picture of the world which rejects the autonomy of content and, hence, cannot adequately account for behaviour. As a theory of content, Fregean semantics is broader than formal semantics, though the two might overlap to some extent. Though this issue touches upon the more general issue of the relation between thought and language, which is not going to be dealt with, it is purposeful to offer some brief remarks. The relation between *formal semantics* (or, broader, the structures of language) and *Fregean substantive semantics* (or, broader, the structure of thought) can be conceptualised in the following way: formal semantics are not as such a theory about intentional content. A theory about intentional content aims to elucidate the formation of beliefs,

⁷⁵ Ibid. 12.

⁷⁶ For the idea of semantics as a theory of content see Luntley, *ibid.* 14-18

desires, etc. and other propositional attitudes in connection to the world in a way that can account for rational behaviour. It should, in other words, account for both the constitutive and the engineering tasks. Formal semantics may be the medium to put content into some symbolical structure (linguistic structures), nonetheless, it cannot on its own explain why this content is about the world or why it explains rational behaviour. Formal semantics will always be in need of some theoretical account as to the way the world is conceptualised within thoughts and as to the way this conceptualisation affects rational behaviour. Take, for instance, a theoretical account of content which identifies formal with substantive semantics (like Fodor's 'Language of Thought'⁷⁷). Within such a theory content will be *prima facie* identified with syntactic or linguistic structures; unless it is further connected to an account of how linguistic structures make contact with the world, it will not be able to explain properly human behaviour. It is, actually, this further concern, to offer an explanation of human behaviour, that makes the difference between formal and substantive (in our case Fregean) semantics. Of course, insofar as substantive theory understands formal semantics as the medium of expressing the structure of thought, the two will overlap; but they will never be identical. This would, for the moment, suffice as a rough sketch of the relations between thought and language and the question whether the latter exhausts the former.

Normativity of Content

A Fregean theory of content takes intentional realism seriously and endorses the autonomy of thought. To that extent, it attempts to give a description of thought-content which is non-reductionist. But, in doing this, it does not presuppose that intentional content is independent of the mind and the world. In fact, it wants to offer an account of content which will be compatible with our being physical creatures in a physical world; an account that will not be necessarily carved in a physicalist vocabulary. This account of content will be also an account of the mind and the world, precisely because, mind, thought and the world are envisaged as being interconnected, as opposed to a reductionist account that takes them to be independent.

In discarding the physicalist vocabulary, the non-reductionist account of content focuses mainly upon the normativity of meaning (content) as it is revealed through the patterns that underlie our use of expressions. Meaning and understanding place obligations upon speakers to use the relevant expressions in a patterned way. Those patterns can be

⁷⁷ For an account of Fodor's project, see Luntley, *ibid.* 12-13.

described independently of the physical mechanisms that underwrite our way of dealing with expressions (i.e. various brain states). Furthermore, they enjoy an *a priori* status since they constitute the necessary presuppositions of meaning and understanding and can be described in a non-empirical way.

The elementary pattern within which meaning and understanding unfold is, for an account of Fregean aspiration, the sentence. Words have meaning only in the context of sentences. This claim is conceptualised as the *context principle*⁷⁸. The context principle narrows ontology down to the patterns expressions exhibit within the structure of sentences (as the elementary semantic structures). As a result objects are revealed through the patterns that certain words (names) exhibit within the context of sentences⁷⁹. This is the case not only with names that denote concrete objects, but also with those that denote more abstract objects [like legal concepts (e.g. contracts), numbers, musical compositions, a game of chess, etc.]. Let us take the case of arithmetic which was also Frege's main concern.

Whether numbers are objects depends upon the claim that numerals are names⁸⁰. To establish this claim it is not enough to look at whether numerals point towards objects. One reason for this is, of course, that numbers are abstract objects and hence not available to our senses. But to hold this as the decisive reason for our inability to establish the fact that numerals are names simply 'by looking around' is to miss the whole point. This is so because for something to be a name (i.e. name for an object) is not about its standing in a special relation to an object (as an ontological category). Rather, a sign is a name only to the extent that it demonstrates the appropriate pattern of use within the context of a proposition (sentence). Consequently the question whether numerals are names, and hence whether numbers are objects, turns upon the question whether they exhibit the appropriate pattern of use within the relevant propositions. If we refer to the patterns of use as the grammar, the claim can be furnished as saying that numbers are objects if and only if numerals exhibit the grammar of names⁸¹. In this way, in engaging in the *a priori* study of grammar, we unveil what sort of objects there are. This study of grammar is a study of the patterns of thought and to the extent that thought is individuated through language, a study of language. The

78 For a brief account of the Frege's context principle and the primacy of the sentence/proposition see Luntley, op. cit. 16-18.

79 The context principle can be combined with the following idea of Wittgensteinian origin: objects do not exist independently, but are integrated with other objects within certain arrangements of events (the Wittgensteinian *facts*). Now the structure of the sentence depicts precisely the level of facts, whereas names occupy a position similar to that of objects.

80 See Luntley, *ibid.* 17.

whole program of studying semantics or the grammar of thought before or instead of ontology boils down to the claim that there is no non-conceptual or transparent experience of reality⁸².

The fact that the sentence is the elementary unit of grammar/meaning should not remain unqualified. Sentences are never single-element units but composite ones, usually exhibiting a complex structure that contains several parts (names, predicates). Frege acknowledged this fact by endorsing the thesis that the meaning of a sentence (or thought) is a function of the meaning of its parts, or the *compositionality thesis*⁸³. The compositionality thesis should not be taken to overrule the context principle or the idea that the sentence is the context within which names acquire meaning. Were it the case, the result would be something like the claim that it is possible to offer an account of names independently of their grammar which is tantamount to saying that meaning presupposes a queer sort of connection between mind and object. Instead the compositionality thesis should be interpreted as giving expression to the idea that sentences are structured because they embody judgements (or assertions) about structured bits of reality (facts). Being about facts judgements are amenable to the binary evaluation truth/false, whereas isolated names can never be either true or false. Judgements, to put it bluntly, can be true or false because they depict bits of the world and it is the case that something is truth-evaluable only in relation with how the world is (what is the case), whereas isolated names do not say anything about the world.

Thus in order to establish what a name stands for (its reference) it is necessary to attach that name to a true judgement which depicts a bit of reality. The semantic priority of the judgement over its parts is, in a sense, established on the composite structure of the world that is depicted by the composite structure of judgements: yet, in a trivial way, the formation of judgements, as of every 'whole', presupposes the understanding of its parts. Be that as it may, understanding those parts need not be independent of their being embedded in judgements: using predicates (concepts) and names in judgements requires that we understand the way they function within (other or several) judgements: saying that a (the table) is F (red) implies that we already understand both how the name a functions in judgements of the form Ga, La, etc. ('the table is blue', '...is yellow', etc.) and how the concept F functions in judgements of the form Fb, Fc, etc. ('the chair is red', 'the door is red', etc.). In other words, names, predicates and other terms can only be grasped through the form of judge-

81 Ibid. 17.

82 Ibid. 17.

ment, yet, once understood, our knowledge is about those names and the objects they denote and not just about the judgements that contain them and the states of affairs (facts) they denote⁸⁴.

A further important aspect of the priority of truth over reference is the fact that in uttering a judgement one places oneself under the normative requirement of the binary distinction true-false. If the judgement is false one should be ready to withdraw it. Conversely something that looks like a judgement but is not uttered under the obligation of withdrawal is not really a judgement⁸⁵. Thus the caveat of withdrawal captures the very essence of the normativity of meaning and grammar (or the structure of thought). Grammar is shaped according to the dichotomy true/false in so far as its elementary units are sentences. Consequently when we talk about grammar we refer to the logical structure of judgements that makes them truth evaluable. Grammar (or the structure of thought) is logical. It is logical as opposed to linguistic, because the grammatical structures of ordinary languages cannot necessarily account for the way sentences are truth-evaluable. Luntley puts in an acute way:

The study of grammar involved is...seen to be the study of that structure of our thought and language that makes it truth-evaluable. That is to say, the priority of semantics over metaphysics amounts to the claim that it is by studying the structure of our thought necessary for it to be aimed at truth that we uncover the structure of the world. Semantics provides an account of the structure of thought. It provides an account of the structure of language that makes it suitable for thinking and saying things that can be true or false. In so far we restrict metaphysics to what can be thought about or talked about, then a study of thought and talk will, ipso facto, be a study of the general structure of what is. On such a view, semantics gives us the outline structure of what is thinkable. The only metaphysical issues left untouched by such a study will be the issues concerned

83 Ibid. 18.

84 See Luntley, *ibid.* 22. Also Coffa, *The Semantic Tradition from Kant to Carnap* (Cambridge: Cambridge University Press, 1993), CHs 4 and 5. On the formation of judgements and the connections between linguistic patterns of use and ontology see the classic and exemplary treatise of Quine, 'Speaking of Objects' in his *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1977), 1-27 (1-16). Quine shows, in the best way, how the structures of language manage to 'reveal' the objects around us by demonstrating that the more complex judgements one is able to form, the more refined one's ontology is. Of course Quine's purpose is to undermine the objectivity of conceptual schemes by showing how tightly they are connected to the various linguistic structures. His demonstration has, nevertheless, been exploited in the opposite direction, the one I am also using; for such an account see the bulk of Donald Davidson's work and for a quick summary his recent 'Seeing through Language' in J. Preston, *Thought and Language* (Cambridge: Cambridge University Press, 1998), 17-27.

85 See Luntley, *ibid.* 20, 21; the obligation of withdrawal can be taken to express the passive side of what Habermas and Alexy call the *claim to correctness* that is raised anytime one utters an assertion. For a detailed discussion of the claim to correctness vide CHs V and VI, *infra*.

with the unthinkable. It is not clear that that amounts to anything at all⁸⁶.

In all the semantics-exhausts-ontology thesis amounts to the idea that the semantic evaluation of sentences has an explanatory priority over the semantic evaluation of sub-sentential expressions with the result that truth is the primitive semantic concept and not reference. Our grasp of what it is for a name to refer is the grasp of the role it plays in true judgement.

The Menace of Idealism

Favouring the philosophy of thought over ontology is prone to create the impression of rebutting realism for a certain sort of linguistic idealism. This allegation is connected, in particular, with the traditional prejudice that any rejection of representationalism is tantamount to a refutation of realism. If content is *a priori* connected with our way of conceptualising the world how can it be anything more than a subjective account? Moreover, the objection goes, if semantics-exhausts-ontology, how can any talk about the world amount to anything more than an account of signs and the way we use them?

The value of these worries notwithstanding, it is not as straightforward that a grammar-based account of content in refuting representations and the mind-world dualism necessarily makes a move towards denying realism. Frege, in juxtaposing thoughts (the content of judgements) to ideas (the main unit of mental representations) never misses an opportunity to say that thoughts are objective entities whereas ideas are subjective. For Frege the subjectivity of ideas reflects in the fact that we cannot communicate with them, since what we communicate with has to be shared by everyone. Conversely, thoughts are what we communicate with, hence they are shared by everyone. This is one reason that supports the claim about the objectivity of thoughts. A second lies in the fact that thoughts and not ideas are the bearers of truth/falsity. And for Frege truth is always *objective*⁸⁷.

Those Fregean remarks indicate already the line of argument that can refute the accusation of the denial of realism: Thought is truth evaluable, hence objective; it is not about something that is internal to the mind as opposed to, say, something external that lies out there (i.e. the environment). That is to say, grammar does not step into the place of ideas, while the world still occupies the other side of the representationalist's dualistic universe. Were it the case, the semantics-exhausts-ontology thesis would, of course, be neglecting the

⁸⁶ Luntley, op. cit. 23.

⁸⁷ See for an accurate summary of these claims, Luntley, *ibid.* 26-28.

world-side in an unforgivable way. But this naïve picture makes sense only if one sees the claim for the priority of thought through the prism of representations and the concomitant mind-world dualism. The priority-of-thought thesis should not be understood just as an inversion of the dualistic picture that favours intentional activity (judgement formation) over perceptive activity (sense-data, the world). Such an inversion is, indeed, 'introvert' in the sense that it falls short of explaining the aboutness of language by alluding to something like the priority of the Giving (intentional activity/judgement formation) over the Given (perceptual activity/the world).

Instead what the semantic-exhausts-ontology thesis is really about is the idea that neither the Giving nor the Given enjoys ontological priority in accounting for content which is another way of putting the refutation of the mind-world dualism. Further, this refutation is not self-standing, an axiom that is accepted without further evidence. It is, as discussed earlier, the only consistent conclusion of the effort to account for content in connection with a rational explanation of human behaviour. Though the issue of realism and idealism will be a recurrent issue in the course of the dissertation and it will not be solved until later (if at all!), some further remarks seem appropriate at this stage.

The priority of the grammar of thought, as an integral part of the rational explanation of behaviour, builds upon the idea that it is impossible to give an account of the reference (of a sign) independently of (its) grammar. In pleading for this it endorses the claim that grammar has an *explanatory priority* over reference and not that reference is non-existent. This claim lies at the heart of the anti-dualist argument for the relation between the mind and the world and does not purport to refute reference in favour of grammar. Now, in this 'monistic' picture, grammar and the reference of names are inseparable and the only asymmetry that occurs is the explanatory priority of grammar which rests upon the need to account for behaviour. Still, intentional activity (grammar), insofar as it reveals the ontological structures of the world, has to be supplemented by the inputs of perceptual activity. It is precisely at this point, the point of the interconnection of the mind, the thought and the world, that the monistic picture needs a non-dualist vocabulary that would avoid concepts which might foster any impression of dichotomy. In a non-dualist account of content the world is not really an input into something (the mind) which is later neatly organised into a pattern (the grammar). This vocabulary is indeed misleading to the extent that it nurtures an introverted ontology. Here is a more appropriate way to put it: 'input' is already part of the *a priori* account of content; that is, content is (about) the world and grammar plays the role of something like a 'pilot' who navigates through the world and 'cuts' it according to the

need to account for rational behaviour⁸⁸. When I point towards the Chrysler building saying: ‘the roof demonstrates a fine example of art-deco architecture’, the grammar of my judgement cuts the world to fit the judgement’s content⁸⁹. Here my judgement’s content is not about something different (e.g. an idea) from the Chrysler building; nor does the Chrysler building have any relevance to my judgement’s content other than the one dictated by its grammar. Once dualism has been defeated there is no gap left between intentional activity and the world and, hence, no need to succumb to any kind of ‘ranking’ between them because both coincide in content-formation the way grammar prescribes. That is to say, grammar or the structure of thought offers the transcendental justification for an equal participation of intentional activity (the Giving) and the world (the Given) in the process of content-formation. Luntley makes this point with eloquence:

Suppose that the metaphysical input to grammar is transcendently justified; that is, it is not a gratuitous metaphysics plugged in just to get the right results, it is there in order that we cut content at just the points necessary to get that which rationally explains behaviour. That, then, is anti-representationalism, for it is the idea that the individuation of thought and its logical grammar is world-involving. The logical grammar of thought, the structure by which it is truth-evaluable, is not, then, a linguistic structure. It is a structure of how we are in the world. The possession of content is the possession of the world. Furthermore, if in our responsiveness to reasons, we take ourselves to be responsive to contents (beliefs, etc.), this means that our responsiveness to reasons can be a direct responsiveness to the world. The world comes within the province of our thoughts, it falls within the space of reasons⁹⁰

All in all, the idea is that content is world-involving and grammar is the structure of the world (hence of the content) to the extent at least that the world is viewed through the prism of the need for a rational explanation of human behaviour.

Agenda

In chapter III, I will discuss in more detail the issue of the objectivity of thought-content in the context ^{of} an anti-representationalist semantic theory of content, like the one sketched in the second half of this chapter. In doing so I will outline an account of thought-content that escapes the sharp boundaries of the distinction between realism and idealism. For that pur-

⁸⁸ Compare with Luntley, op. cit. 26-30.

⁸⁹ See the identical example of S. L. Hurley in *Consciousness in Action*, 16.

⁹⁰ Luntley, op. cit. 27.

pose I will refer to the Fregean notion of the *objectivity of thought* as the objectivity that rests upon the logical structure of grammar. I will further maintain that this semantic/logical notion of objectivity is fully qualified in offering a *mind-independent* account of objecthood. The result will be that realism's interest in mind-independence and objectivity will be satisfied without evoking an ontology that transcends the limits of language (semantics). Finally, resting on the notion of objecthood-as-objectivity, I will embark on a rough account of the objecthood of legal entities which will be completed in Ch IV.

CHAPTER III

LEGAL AND OTHER ABSTRACT OBJECTS

INTRODUCTION

The semantics-exhausts-ontology thesis rests upon two pillars: the idea that *representation-ism is false* and the idea that *the structure (or the grammar) of thought is, more or less, linguistic* and can be represented by the structure of the (assertive) sentence. *The first idea* implies the rejection of a dualistic picture in which the mind and the world make contact through representations or some other sort of interface. The rejected assumption was further supplemented by the thesis that the mind (thought) and its contents are shaped within the world while the world is revealed in the grammar of thought. Hence, the story goes, the structure of the thought is the structure of the world, or at least of this world, the one inhabited by our minds. At the same time, *the second idea* holds that the structure of the thought is nothing more and nothing less than the structure of the language. Taken together, these two ideas amount to the belief that the structure of the world is (via the structure of the thought) roughly identical with the structure of the language. Hence, anytime we want to know to what kinds of entities we are *ontologically committed*, the most appropriate thing to do is to inquire into the grammar of our statements about the world and the patterns of our reasoning with those statements. ‘What objects there are’ depends upon whether some terms exhibit the appropriate pattern in true statements. This structure of the statement depicts the structure of the world. This structure is objective owing to its being *a priori*, and hence it does not depend upon subjective inner psychological states.

Connectedly, when we want to account for mental/intentional content we need to look into the objective structure of thought which is the objective structure of the world. When we form statements about the world, objectivity (of mental content) comes, so to speak, in ‘one move’ without involving any act of comparison between *representans* and *representandum*. Circular as it may appear, this conception of objectivity is firmly founded on the ground of a mutual constraint: the grammar of the thought will be objective to the extent that it succeeds in forming (truth-evaluable) judgements about the world, whereas the

structure of the world will be objective to the extent that it is depicted by objective thought-structures (judgements). In a sense objectivity states the conditions for an equilibrium between the world and the thought in a similar way that a physical body, by performing a turning move, signifies the harmonisation between two complementary forces (centrifugal and centripetal). The world and the thought stand in an analogous complementary relation rather than in an antagonistic one. And the formula of this relation can be revealed in what has repeatedly been called the structure of thought (grammar).

TWO CONCEPTS OF OBJECTIVITY

The notion of objectivity in the context of a Fregean theory of content certainly calls for some further elucidation. Objectivity, here, refers to the logical form (or the structure) of thoughts and the patterns of (inferential) reasoning as opposed to the subjectivity of inner psychological states. Both the structure of thoughts and the patterns of reasoning are the subject matter of logic. The juxtaposition between logic and psychology emerges, in Frege's own work, as a product of a rigorous effort to reject the view that logic is a psychological (hence empirical) category¹. One of the main shortages of a psychologistic explication of logic is that the content of logic is empirically conditioned and therefore contingent: there could always exist some novel situation where new or different logical principles or laws might emerge, as it is always the case with different sorts of pain, pleasure, and so on. Frege opposed this picture by alluding to the fact that our judgements and the inferences upon which they rest do enjoy a degree of objectivity that makes it possible to ascertain if they are correct or not independently of our inner psychological operations². To that extent the objectivity of logic initiates from the way things are: take for instance the principle of iden-

1 For a very clear exposition of the issue of objectivity in Frege's work, albeit in a clearly Kantian spirit, vide T. Ricketts, 'Objectivity and Objecthood: Frege's Metaphysics of Judgement' in L. Haaparanta and J. Hintikka (eds.), *Frege Synthesized*, Synthese Library, vol. 181 (Dordrecht: Reidel, 1986), 65-95.

2 Think the objectivity of grammar as referring to the structure of a judgement minus what Russell called the propositional attitude or our disposition towards the judgement's content (the attitudes of assuming, wondering, asserting, etc.). Vide Also Coffa, *The Semantic Tradition from Kant to Carnap* (Cambridge: Cambridge University Press, 1993), 67, where he mentions Bolzano's distinction between objective representations on the one hand and subjective representations and the reality on the other. According to it objective representations consist neither in the object itself for '...the object is located in space and time', nor in any subjective representation for subjective representations perish with the passing of the time whereas the objective content of the judgement persists (Coffa, *ibid.* 67). The analogy between the objectivity of representations and the objectivity of grammar is quite straightforward (though in our case the talk of representations is not particularly appropriate considering our rejection of dualism).

tity that says that every object is identical with itself (' $t = t$ ')³. Independently of the psychologico-empirical mechanisms that underlie an identity judgement, there is a further necessity for the validity of that principle which has to do with the fact that every object is indeed identical with itself. This is a property of objects that is, in some objective way, independent from the psychological groundwork of judgement-formation but nevertheless essential to the content of the judgement on self-identity. Put this way the issue of objectivity expresses mainly the idea that the objectivity of our judgements is linked with the way the external world is rather than with the inner mechanisms that support judgement formation. Frege says:

Thus I can also acknowledge thoughts as independent of me. Other men can grasp them just as much as I: I can acknowledge a science in which many can be engaged in research. We are not owners of thoughts as we are owners of our ideas⁴.

Now, given this notion of objectivity, there are two ways of interpreting it⁵. The first is the more crude way of Platonism. It rests on the somewhat naïve contrast: external world (objective) – internal states (subjective). According to this unrefined classification if we want to find things that are objective we have to look into the realm of objects; hence if thoughts are to be objective they have to be themselves placed, as mind-independent abstract objects, next to the other concrete objects of the external world, according to the way Platonism prescribes. Seen this way the Fregean project amounts to no more than an attempt to bridge the mind-world gap which reopens through Platonism. Ontology re-assumes priority over grammar and the logical structure of judgements becomes dependent upon an ontological account of what exists (which, at the end of the day, might end up being equally empirical as a psychological account of inner states). Here, the distinction objective-subjective is defined through the background of (Platonist) ontology.

An alternative way to interpret the notion of objectivity is to abide by Frege's interest to ground the objectivity of logic in an *a priori* way within the structure of judgements and the patterns of reasoning that aims to the formation of true judgements. Seen this way objectivity refers to the *a prioricity* of the logical structure of inferential reasoning. This

3 Vide Ricketts, 'Objectivity and Objecthood', 68.

4 Vide Ricketts, 'Objectivity and Objecthood', 72. The passage originally appears in Frege, 'Thoughts' in P. Geach (ed.), *Logical Investigations* (Oxford: Blackwell, 1977), 24. Note that Frege uses the word 'ideas' to refer to subjective psychological inner states.

5 For a more or less similar distinction, vide Ricketts, *ibid.* esp. 65-74.

structure is a prerequisite in order to refer to objects (abstract or concrete) and therefore the notion of objecthood makes sense only against the background of judgements and the patterns of reasoning with them. To put it more vigorously, if thoughts need to be objective in the last instance, they have to claim an *a priori* objectivity which is prior to the notion of objecthood. Rather it is the latter that rests on the former. On this account objectivity lies in the logical structure of judgements as they are employed within patterns of reasoning. In other words, *what is objective is something akin to the matrix of the thought* and retains some priority towards both our internal states and the way things might turn out to be (as depicted in true judgements). This structure reveals what kind of terms or building blocks can potentially form the content of a judgement irrespective of the judgement's truth or falsity. Admittedly, the grammar of thought is especially interested in the formation of true judgements and therefore not every combination of blocks will be satisfactory. This fact notwithstanding, truth and falsity depend upon the structure imposed by the grammar of judgements⁶. That is to say, before anything can be judged as being the case or not, as existing or non-existing, it has to be incorporated or 'translated' into a judgement according to the way and under the restrictions grammar prescribes.

ON THE OBJECTIVITY OF THE GRAMMAR OF THOUGHT

In a Fregean context, when we talk about the objective grammar of thought we refer to those patterns that govern the formation of judgements and the inference of valid (true) judgements from other valid (true) judgements (this is the process of reasoning). These patterns, or laws are, trivially, identified as belonging to the realm of logic, i.e. as being laws of logic. The laws of logic have to be general laws that apply universally to the process of reasoning that enables us to connect the content of thoughts with truth-values (by forming valid judgements). Only by complying to those standards may the laws of logic form the basis of communication which otherwise cannot be achieved through subjective inner psychological states. Put in this way, the objectivity of the grammar of thought consists in the objective, general and universal laws of logic. Those laws have as their subject matter the formation of correct judgements. To that extent they are the standards for the formation of correct

6 This notion of objectivity shows a certain affinity to A. Marmor's conception of *logical objectivity*. This is the objectivity that applies to some type of discourse if it is possible to ascribe determinate truth values to the statements comprising the discourse (vide A. Marmor, 'An Essay on the Objectivity of Law' in Bix (ed.), *Analysing Law: New Essays in Legal Theory*, (Oxford: Clarendon Press, 1998), 3-31 (6, 7)). One could say broader that the objectivity of judgements lies in the fact that their seman-

judgements. Depicting this connection between logic and truth Frege says:

Just as 'beautiful' points the way for aesthetics and 'good' for ethics, so do words like 'true' for logic. All sciences have truth as their goal; but logic is also concerned with it in a quite different way: logic has much the same relation to truth as physics has to weight or heat. To discover truths is the task of all sciences; it falls to logic to discern the laws of truth⁷.

At this point, the most crucial question for the issue of ontological commitment is where one is going to locate the standards of truth or else correct reasoning. A Platonist explication which reifies truth (-values) and other standards of correctness as objects that can be associated to thoughts according to a name-bearer relation, would undermine the central importance of the judgement. Such a move would signify a backwards move towards the undesired mind-world dualism with the effect that the judgement would lose its ability to depict the world (which is the same as saying that it is objective). Besides being undesirable, the Platonist move seems also to be unfounded within the Fregean project. Not the least so, because any Platonist move would imply the unacceptable, within the Fregean project, claim that the standards of correctness are detached from the judgement. Making this last point the starting point of a Kantian interpretation of Frege's conception of objectivity in judgement-formation, let me illustrate the impermissibility of the Platonist argument.

A judgement-focused⁸ explication of Frege's program resists the idea that logic, as consisting of the standards of judging, is about judging itself in a pure form. It is not the case, in other words, that the laws of logic generalise over the forms of statements as regards their truth, thus amounting to the use of schematic letters and a truth predicate⁹. Within the Fregean project logic seems to realise a more substantive role. The basic laws of logic generalise over everything and every property. They do not mention the one or the other specific thing nor they generalise over things in relation to the one or the other property. The point is namely that in Frege the laws of logic, or the standards of reasoning, do

tic/logical structure makes them truth-evaluable.

7 Vide Gottlob Frege, 'Thought', in M. Beaney, *The Frege Reader* (Oxford: Blackwell, 1997), 325-345 (325).

8 For a very interesting exposition in this spirit, vide H. Ricketts, 'Objectivity and Objecthood', as well as his 'Logic and Truth in Frege' in *The Aristotelian Society, Supplementary Vol. LXX* (1996), 121-140. Instead of judgement-focused one could say Kantian. I think, though, that using the former leaves less room for misconceptions.

9 As Ricketts notes this a more contemporary idea of logic, vide 'Objectivity and Objecthood', 76.

not substantiate externally to the concrete judgements in a way that would involve a meta-language which would describe the way those standards apply to the judgements in order for them to be true (correct). Instead, the more substantive conception of logic which resides in the Fregean program, endeavours to reveal the standards of reasoning within the context of the judgement.

The predicate 'true'

A very good way to elucidate this point is by taking the predicate 'true'. For Frege the attachment of this predicate to our statements is not required because truth is not an (external) property that we need to attach to our thoughts through judgements. Any definition, in a meta-language, of the concept of truth taking it to be a property of thoughts, say in the way that the correspondence theory takes it to be, would imply that we need a judgement in order to connect thoughts with the property of truth in the same way that we need some other recognitional capacity in order to connect a chair with the property of being red. But the capacity to recognise anything as having some property is not more than making a judgement. If this is the case then it seems that judgements are of two kinds: those that assign properties to things (as the property of being 'red') and those that assign the specific property of being true specifically to thoughts. Such a conclusion is absurd. Its absurdity derives from overlooking that any judgement of the form 'the chair in front of me is red' does not assign any property to the corresponding thought but merely fulfils the requirements for a true thought by associating it with a whole network of inferential reasoning¹⁰.

In a way, truth is not a property to be assigned to something (a thought) but relates to the method that properties are assigned to things through judgements. If the judgement assigns the property in a successful way then the corresponding thought is true. And the success of such an assignment is constituted through the valid inference of the judgement from other judgements and not on the basis of an extra judgement that aims to connect the original judgement/thought with the property of truth (the way truth is specified by a meta-language). On the contrary, supposing the latter would lead to an infinite regress: every time we would form a judgement in order to connect a thought with the property of 'being true' according to the conditions set in some definition of truth, say 'correspondence with real-

10 Truth is in a way connected with the process of judging through reasoning. If thoughts can be viewed as isolated propositions 'corresponding' to some 'frozen' bits of reality, judgements are incorporated in chains of reasoning and are connected with other judgements in a way that makes them permissible (true) or false (impermissible).

ity', we would need a further judgement in order to connect the thought that the first thought is connected with the property of truth ('corresponds with reality') anew with the property of truth (as a 'correspondence with reality'), and so on¹¹.

The important lesson to be drawn from the hitherto discussion is that truth and the other standards of correctness of judgements cannot be given on a meta-level, externally to judgements. Of course, this is not to say that there are no standards or that they are in some way ineffable. Frege takes those standards to be of the maximal generality and not to be inferred on the basis of the laws of any other domain of knowledge (or discipline)¹². Amongst those standards for the correctness of judgements are the laws of logic and the principles of inference (like, for instance, the *modus ponens* argument) which Frege takes to be distinct from the former. Be that as it may, in the Fregean system, the standards of correctness are not provided by statements *about* the judgements of a domain of knowledge, but are demonstrated *through* the judgements within the domain of knowledge. Meeting or failing those standards is not a property that is ascribed to our thoughts through judgements; it is the appreciation within our reasoning of the limitations that this standard sets to our reasoning:

The recognition of a thought to be contradictory is not a judgement to the effect that a thought has some property. It is rather an apprehension manifested by the refusal to affirm the thought while affirming the opposite. Similarly to recognise that one thought implies another is to be prepared to accept the second on the basis of the first¹³

This conception of truth and the other standards of correctness as being made explicit within judgements, yields a picture of the grammar of thought according to which the latter is realised within the process of our inferential reasoning. To locate the grammar of thought, as containing the standards for making judgements, within the process of reasoning has the seminal effect of locating objectivity within language. This is one of the most important transformations that the so-called *linguistic turn* achieved during the transition from the 19th

11 Vide Ricketts, 'Objectivity and Objecthood', 77-79; and for a more detailed account of the infinite regress, his 'Truth and Logic', part II. Having said that, a judgement-immanent account of truth would not be impossible. In fact chapter IV will attempt to mould such an account under the label of a 'semantic theory of truth'. A semantic theory of truth will provide for a definition of truth yet in such terms that the definition will remain within the requirements of the present reading of Frege's conception of truth.

12 Vide Ricketts, 'Objectivity', part II.

13 Vide Ricketts, 'Objectivity', 84.

to the 20th century. After taking this step the environment is no longer conceivable in terms other than those of language. If what is true or false, consistent or inconsistent, depends on criteria which are made explicit within our reasoning, then truth and falsity are not a matter of correspondence to, or description of something external, that lies 'out there' but, instead, a matter of reasoning. Moreover not only truth, but, as we will see in a moment, also existence becomes a matter of reasoning. The patterns of inference set the framework within which the ontological segmentation of things into objects (as names) and properties (as concepts) takes place, or, to say with Quine, where 'to be is to be the bound of a variable'. This paradigm-transformation of philosophy, as already stressed in many previous occasions, is precisely the opposite of the subjectivism and the scepticism fostered by the idea of a radical mind-world dualism. It rests on the conviction that judgements are not combinations of (subjective) ideas in our heads whereas the criteria of truth lie 'out there'. That our judgements are subjective until they come to match (how then?) the world. Rather, the underlying assumption of the linguistic transformation, is that we escape from our subjectivity at the moment we succeed to form valid judgements and to reason successfully. At that point we start *participating* in the world.

Truth and correctness are, thus, interwoven with the way the grammar of the thought unfolds as we go along making valid inferences and, broader, reasoning successfully. Let me illuminate two further aspects of the way grammar (or the standards of correctness) is enmeshed with the process of judgement-formation. The first aspect concerns the fact that grammar enables us to distinguish between the grasping of a thought and its being true or false. It is often the case that despite being not in a position to ascertain a judgement's truth or falsity, we still can understand or grasp it. Here grammar provides something like the *intelligibility conditions* for our sentences. The second aspect refers to the fact that our judgements, when taken together as a whole, impose a handful of standards as to the truth or falsity of any new judgement. In this second function grammar generates something like *criteria for coherence*. In this context the truth of a judgement will always depend upon the inferences that previous valid/true judgements generate. Both in its intelligibility and coherence roles grammar determines in an *a priori* way a great portion of the truth conditions of our judgements. It is the case, in other words, that the combination of intelligibility and coherence as emerging from the structural requirements of grammar lay down in an *a priori* way the truth conditions of a new judgement. Take for instance the following two judgements:

J1: All Mediterranean countries are warm,

And

J2: As a Mediterranean country Greece is extremely cold.

As they stand those two judgements are logically (that is *a priori*) incompatible. Even if we do not have any other information about their truth-values, their combination forces us to say that one of the two is false. This conclusion can be based merely on the structural features of the two judgements: on a first level we are able to grasp the two corresponding thoughts without having any information about their being true or false. This ability derives merely from the fact that both J1 and J2 are 'codified' in the same way, i.e. the way grammar prescribes. This codification is the inescapable condition for their intelligibility. Notice now how the code (the logical structure) generates substantive conclusions: since both judgements are captured in the same structure a kind of unity appears between them. It is no longer enough that J1 and J2 are individually intelligible, they have to exhibit a joint intelligibility, or else *coherence*¹⁴. Now coherence, postulated by the *a priori* character of grammar, is in a position to allow or block, in an *a priori* way, potential inferences concerning the truth of the two judgements¹⁵. Assume for a moment that J1 is a true judgement and that

14 In a normative context the requirement of coherence can not be satisfied by mere inferential or deductive reasoning as further evaluations are needed. In legal reasoning it is the case that coherence requirements are met by a two level reasoning. There the first-order or internal justification concerns the syntactical intelligibility and the inferential coherence of legal propositions, whereas the second-order or external justification is more about their practical appropriateness (vide Neil D. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), Chs 2, 5, 7 and Robert Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, 2nd edn (Frankfurt am Main: Suhrkamp, 1986), 273-347. For a very comprehensive review of coherence theories in philosophy and law, as well as for an original statement, vide Susanne Bracker, *Kohärenz und juristische Interpretation*, Studien zur Rechtsphilosophie und Rechtstheorie vol. 27 (Baden-Baden: Nomos, 2000). One of the aims of the present dissertation is to establish the fact that the two levels of justification do not represent anything more than an analytical distinction. This is going to be argued on the basis of the assumption that the pragmatic presuppositions of normative/legal meaning contain an *a priori* principle of practical reason which supplements the *a priori* logical principles that are to be found in the structures of legal language (semantics); vide part III of the dissertation, *infra*.

15 One should be careful to avoid any misunderstanding: what is *a priori* here is the structure of thought and the postulated coherence and not truth itself. Were it the case that the truth of our judgements is *a priori* true there would not be any need for further reasoning! The claim is rather that the *a priori* structure of grammar recasts the problem of truth as a matter of inferential reasoning in a way that avoids the representationalist vocabulary of reference. This having been said, it is still the case that our empirical judgements about the world will be synthetic: there is an endless number of novel judgements on what is the case. It is just the truth of those judgements that is going to be decided

we inquire on the cognitive content of J2. The intelligibility and coherence conditions would *a priori* render invalid an inference of the form J1 → J2, without requiring any further information about J2¹⁶. In a way, namely, the structure of grammar transfers knowledge about the content of J1 to the content of J2 through (inferential) reasoning. Understood in this way logical patterns impose standards according to which we are able to determine the truth or falsity of our judgements on the basis of inferential reasoning. They enable us to appreciate inconsistencies, agreements or analogies between the premisses of our reasoning without resorting to the notion of reference. Inasmuch as reasoning is more of a form of reason-giving rather than of comparing signs (or groups of signs) with correlating objects, truth and falsity become the object of justification. Truth is no longer a question of deciding in a crude/direct way if something of the mind's making refers (corresponds) to something else that exists out there in the world. Once reference has been substituted, under the aegis of the 'semantic-exhausts-ontology' thesis, with the notion of truth, truth cannot be explicated by evoking reference anew. Grammar provides a different means of deciding matters of truth (and, no doubt, reference): this is justification through valid inferential reasoning. Thus, the talk about truth and falsity can be already re-stated as talk about justified or not justified (inferential) reasoning, as already tendered in the previous chapter. Hence, what is not justified will also be not the case (will be false) and vice-versa¹⁷.

Attendance to the forms of inferential reasoning is in the position to reveal the structure of the world which is identical with the structure of the thought and which is, further, inescapable (*a priori*). The realisation of the existence of a common underlying structure implies that this structure is also public in the sense that it is intelligible in an objective way, independently of inner mental processes. It is this assumption that led Frege to distinguish between the process of causal explanation of a person's beliefs (psychology) and the justification of those beliefs (logic)¹⁸. It is the latter, justification through inference, and its underlying structures that are objective and with which Frege's interest exclusively lies. Construed this way judgement formation is based on our ability to appreciate logical pat-

against the background of our hitherto valid judgements (this is not odd considering the fact that all this is said on the basis of the non-dualist assumption that the world is the thought and vice-versa. On this assumption anything that does not exist or is not the case can only amount to a false judgement).

16 The underlying symmetry between the world and the thought emerges here quite graphically. True facts will block inferences that lead to false conclusions.

17 Clearly this point requires detailed argument in order to be established, argument that escapes the scope of the dissertation. Perhaps a suitable line of argument is to suppose that some notion of justification that includes possible along with actual judgements would be able to accommodate the tendered point.

terns, inconsistencies and implications within a process of reasoning. Making or using judgements amounts to no less than mastering the ability to agree and disagree, to reason with others and, to put it in a nutshell, to communicate¹⁹.

In all, in the second of the two surveyed interpretations, the notion of objectivity is not about a distinction between (subjective) mental entities and (objective) external objects. More than that, objectivity refers to the *conditions* that are common both to the thought and the world (and hence to objecthood). These conditions are in both cases common and *a priori*. Objectivity so portrayed sets the framework within which both communication and knowledge are realised. The conception of a common and objective structure for the thought and the world ensures that meaning and ontology, hence communication in language and knowledge of the world are just two sides of the same coin. That is, knowledge will always be canvassed against the background of successful dissemination of meanings and, vice-versa, meanings will always be assembled on the basis of what is (or is not) the case. Conversely private judgements or private insights into the substance of the forms of the Being are not eligible to produce either meaning or knowledge, hence we cannot communicate/know anything about them²⁰.

AN OUTLINE OF A SEMANTIC EXPLICATION OF ONTOLOGY

The judgement-centred explication of truth and correctness amounts to a relocation of objectivity from the realm of ontology to that of inferential reasoning. In response, one can analyse ontological categories as being *supervenient* on logical ones²¹. This is made available on the appreciation of the fact that the grasping of inference patterns involves thinking of statements as logically segmented into significant parts. By applying the inference patterns one comes to realise that statements are segmented into names and predicates. Those inference patterns involving quantification, different levels of generality, and so on simply show that names and concepts make, respectively, always the same contribution to the truth-values of the statements they belong to (Frege says for names that 'they refer to objects',

18 Vide Ricketts, *ibid.* 74-75.

19 The idea that judgement formation is embedded in a communicative enterprise will be further developed in part three of the dissertation. For the moment it will suffice to say that the idea of communication will be reconstructed as the *telos* of judgement-formation in language. Connectedly the idea of communication will function as a normative constraint for our judgements.

20 These ideas will be further developed in CHs V and VI in the context of a discussion of L. Wittgenstein's private language considerations.

21 Vide Ricketts, *ibid.* part III.

whereas predicates ‘refer to concepts’)²². Hence referring to an object or a concept, depends on the role a word plays within the context of a statement and broader within an inference scheme (this is the so-called *Context Principle*)²³. In this sense the expression ‘referring to an object/concept’ cannot be ascribed to the realm of ontology since its real purpose is to state the semantic role that a word (name and predicate respectively) plays towards contributing to the truth-value of a statement. It is noteworthy that Ricketts reconstructs Frege’s talk of statements’ ‘meaning’ (referring to) truth-values as analogue to the way ‘Venus’ means (refers to) a planet. Ricketts argues that this analogy should not be interpreted as re-introducing the primacy of ontology through the name-bearer relation. Instead Frege’s talk about statements’ ‘meaning’ (referring to) truth-values should be interpreted according to the way ‘meaning’ was explicated through the context-principle, namely as the way something contributes to truth and objectivity. Only in this way can one retain the idea that the standards of correctness are judgement-immanent, as well as the related idea that truth is not a property of the contents of judgements²⁴. This reconstruction can be taken to capture the insights of the ‘semantic exhausts ontology’ thesis that was introduced in chapter II.

Evidently the semantics-exhausts-ontology thesis delegates the authority for answering the question ‘which objects there are’ to grammar. In particular it is the structure of the judgement which will reveal which objects are depicted by the various terms which form the parts of a judgement. Things are not very different with *legal terms and legal rules*²⁵. Any inquiry into the nature, existence, etc. of legal entities (rules, principles or other legal terms like, say, ‘free movement of goods’ or ‘mitigating reasons’) will turn into an investigation of the appropriate judgements that contain the relevant terms. I am going to make references to two different strategies for accounting for the ontological status of legal terms/objects. The first is strictly Fregean and makes use of Frege’s account for abstract objects, a species of which legal objects are considered to be²⁶. Measured against the realism-anti-realism debate, this strategy seems to vest legal objects with a more robust onto-

22 In the vocabulary of modern analytic philosophy Frege’s ‘Bedeutung’ (‘meaning’) stands for ‘reference’; whereas Frege’s ‘Sinn’ (‘sense’) stands for ‘meaning’.

23 For a very clear presentation of the way language is segmented into ontological categories, vide Frege, ‘On Concept and Object’, in M Beaney, *The Frege Reader*, 181-193.

24 For further analysis vide Ricketts, op. cit. 90-91.

25 It can already be anticipated here that legal rules can feature as nominalised terms in judgements of the form ‘it is a fact that ‘R(ule)’’. Vide the discussion in Ch IV; and for a detailed analysis, Carsten Heidemann, *die Norm als Tatsache. Zur Normentheorie Hans Kelsens*, Studien zur Rechtsphilosophie und Rechtstheorie vol. 13 (Baden-Baden: Nomos, 1997), 324-336.

26 Along these lines runs the account in S. Coyle, ‘On the Foundations of Legal Reasoning in International Law’ (unpublished doctoral thesis, University of Glasgow, 1998), CHs, 3 and 4.

logical texture, in an effort to remain faithful towards Fregean Platonism about objects. Figuratively put, this strategy appears to allude to the first notion of objectivity ‘as objecthood’. Conversely the second strategy, that is going to be labelled Neo-Kantian²⁷, can taken to be more anti-realist or non-realist, to the extent that it fully subscribes to the subordination of ontology to semantics inasmuch as it talks about the world being made available to us through propositional structures (the language). This strategy appears to exploit the second interpretation of objectivity ‘as *a prioricity*’. Though the difference might seem to be important on a dualist picture of the mind-world relations, under a non-dualist or contextualist assumption it seems to loose much of its edge and becomes more of a difference in emphasis. Moreover it is going to be shown that the rejection of dualism will render the realism/anti-realism juxtaposition inadequate as a metaphysical distinction. The reason is roughly that in a contextualist universe the reality of the world as put forward by the notion of reference of signs is perfectly compatible with the epistemological priority of semantics as substantiated by the grammar of signs. Under this assumption the two strategies will be much closer than one might have initially thought.

THE BACKGROUND OF THE FREGEAN PROGRAM²⁸

Now, it would seem appropriate to pinpoint the connections between the semantics-exhausts-ontology thesis and Frege’s original effort to give an account of the structure of thought.

In his *Begriffsschrift* Frege put forward a program in order to achieve in philosophy what Kant thought to be possible only in the domain of arithmetic: a symbolism that portrays not the things it is about but what we say about them, a symbolism that gives a picture not of the things thought but of thought itself, in an objective way²⁹. (Insofar Frege’s logical symbolism was more about what nowadays would be taken to be part of semantics than of symbolic logic). Accordingly Frege tried to isolate the objective from the subjective element in semantics. Again, here, the program of locating objective contents unfolds in the environment of judgement. Frege thought that the *meanings* (the Fregean ‘Sinne’ or ‘senses’) of the words we encounter in a judgement are *objective representations*. Those objective rep-

27 This is the method developed in C. Heidemann, *ibid.*

28 In this section I attempt to paint with a broad brush the tenets of Frege’s philosophy that concern the present discussion. The presentation that follows – which is far from being exhaustive – relies mainly on Coffa, *The Semantic Tradition*, CHs 4 and 5.

29 Vide Coffa, *The Semantic Tradition*, 64.

representations can be either concepts or objects. In other words the meanings of words are one kind of those two objective representations. Now these representations matter not for their own sake but for the things we can do with them by linking them. The various combinations of concepts and objects produce different judgements. Hence a judgement is a linguistic entity composed by different combinations of objective meanings that are either concept or objects. In juxtaposition to Kant, who thought that judgements are combinations of concepts and (sentential) intuitions, Frege managed to 'purify' the environment of the judgement from any subjective elements (intuitions)³⁰, rendering thus his program the most important challenge to the Kantian conception of the judgement.

In this purified environment of the judgement Frege locates the process of understanding human knowledge. Any account of knowledge will have to 'pass' through an account of the semantic structure of judgements, with the further effect that all theory of knowledge will, at the end of the day, be a theory of meanings (semantics)³¹. This theory of meanings will, clearly, involve a study of the three pivotal notions of the judgement, the concept and the object. Frege takes judgements and objects as given and focuses on the study of concept-terms. Contrary to the philosophical mainstream of his time³² he rejects the belief that concepts occur through a gradual process of abstraction of features from particular objects³³, by employing abstract thought experiments independently of the formation of judgements. Against this idea of concepts' being something whose content is already fixed, Frege fully locates concept formation within judgement formation. As a result the content of any concept will occur through its employment in multiple judgements. In fact, in what can be taken to be one of the most revolutionary moves in modern philosophy, he equates the

30 The problem of intuitions and their subjective character would require an extensive analysis. For the purposes of the present discussion I will offer a couple of remarks: intuitions in the Kantian sense are a psychological category because they refer to the way our nervous system deals with signals from the environment. Now if one, like Kant, takes such a category to constitute one of the building blocks of judgements, one cannot avoid introducing into one's account a subjective element. That is, if one makes intuitions more basic than objects, then one makes the metaphysics of intuitions, and its concomitant flaws, more basic than the things that object-terms mean. But think of the following: if the subjectivity of intuitions can be eliminated through the objectivity of object-meanings whenever one takes object-terms to be more basic, that will not necessarily be the case under a reversed order of things. Intuitions, in other words, can be made to be uniform when projected upon objective meanings but not vice-versa. To put it simply, it is of great importance which of the two we choose to make our regulative ideal, the intuition or the object. Taking the former to inform our judgements could easily lead to the acceptance of phenomena of private meaning which would be totally inappropriate to account for meaning, understanding and rational human behaviour.

31 Vide the discussion of anti-representationalism in Ch II, *supra*, *passim*.

32 For a detailed account vide Coffa, *ibid.* CHs 1, 2, 3.

33 Vide Coffa, *The Semantic Tradition*, 68-69.

transition from the judgement to the concept with the step of linking a mathematical function F with its values (Fa, Fb, Fc, \dots etc.). Here concepts are taken to play the role of functions (e.g. F) while values are equated to objects (a, b, c , etc.). Frege ingeniously realised that as it is possible to isolate a function by excluding its values, in the very same way it is possible to capture the content of a concept by subtracting the one or the other object from the environment of the judgement. After taking this step concepts are shown to be ‘unsaturated’, or in need of completion and could be easily represented as ‘valueless’ functions [as in $F(\)$].

As implied, objects for Frege do not constitute a special problem since he takes them as given. Hence he uses them in order to specify the content of concept-terms. Be that as it may, his account of concepts can, due to its coherentist/holistic structure, be equally exploited towards an understanding of objects. On this assumption it is possible that objects be specified through the connection of object-terms with concept-terms in the formation of judgements. The structure of the judgement points towards the fact that the meanings of object-terms are dependent upon the meanings of concept-terms. Since both kinds of meanings stand for objective representations of respectively objects and concepts, it follows that objects and concepts are closely interrelated. Objects, in other words, exist only in connection with concepts. Hence, at the level of judgement, an object exists whenever there is an object term which is subsumed under a predicate (concept-term). The object-term will be then taken to play the role of a name (singular term) and will stand for an existing object. Accordingly, the judgement ‘the table is red’ (F is G) can be analysed as being put together by the two judgements: ‘there is something that is a table’ (a is F) and ‘there is something which is red’ (a is G). Here the singular term ‘ a ’ (or in the composite judgement the name ‘the table’) will stand for an existing object³⁴. Under this conditions any account of the existence of an object will amount to nothing more than the observance of the semantic role that certain expressions (singular terms, names) exhibit in the formation of judgements.

With the help of this rough template of definitions, I would like now to give an outline of an account of legal terms (rules, concepts³⁵) as denoting abstract objects.

34 The existence of an object can be illustrated even clearer when an object’s falling under a given concept is explicated by employing the existential quantifier. In our example this would imply the following transformation: a is F (‘this is a table’) $\exists x : Fx$ (‘there is a something which is a table’; or ‘there is a table’).

35 In order to avoid any confusion, it would be appropriate to note that by using the term ‘concept’ for some legal entities I am not equating them to concept-terms that stand for universals (like ‘red’, ‘round’, etc.). It is rather the case that legal concepts are a species of object-terms; I prefer though to

ABSTRACT LEGAL OBJECTS

The *a priori* grammar of thought makes available the possibility to reconstruct legal discourse as a discourse about (legal) objects. Considering the grammar-dependent notion of objecthood, as portrayed earlier, this is not a very surprising or in any sense particularly ‘robust’ claim: the fact that legal discourse consists of propositions containing terms or expressions which exhibit the pattern of object-terms, allows one to infer the existence of legal objects. Accordingly, when the talk is about ‘contracts’, ‘rights’, and so on, it seems pretty clear that these terms refer, at least in a trivial sense, to those objects. Admittedly, on a closer look, those objects are not the same as tables, chairs or oranges. Other than those concrete objects, legal objects seem to be products of intellectual activity and hence non-material and non-concrete, i.e. abstract (like numbers)³⁶. On the other hand those legal objects seem to share with concrete objects, like apples, the same logical objecthood which points towards a certain externality in relation to mental entities (like beliefs or other intentional states); by virtue of this *objecthood* legal objects are not dependent upon, though they originate from, intellectual activity, in other words they enjoy a considerable degree of *objectivity*.

Legal (abstract) objects and mind-independence

Now there seem to be several issues arising from the understanding of legal objects as abstract objects. Mind-(in)dependence can be taken to be the first one: if legal objects are mental constructions how is it possible that they can claim objecthood in the way other non-mental and mind-independent objects do? This concern is closely interrelated to the issue of realism: if legal objects are indeed mind-independent is it also the case that they are verification transcendent (or better, that the truth of the propositions that contain them, is verification-transcendent)? And what happens if one denies verification-transcendence? Does it amount to denying mind-independence altogether, or merely a very strong version of it? Further, would it be possible to accept some version of objecthood that combines abstractness with mind-independence while rejecting verification independence? Before tackling any of those complicated issues, it might be useful to lay down the guidelines for an argument for the existence of abstract objects that is no more than a generalisation of Frege’s

talk about them as concepts rather than names because of their abstractness (it seems to me that it would sound a bit odd to talk of ‘breach of contract’ as being a name).

36 Cf. Coyle, ‘On the Foundations of Legal Reasoning’, Ch. 3, 82-86.

claim that numbers are objects³⁷. Here are the premisses that support the Fregean argument about abstract objects:

(p1) if a range of expressions function as singular terms in true statements, then there are objects denoted by expressions belonging to that range³⁸

(p2) Numerals, and many other numerical expressions besides, do so function in many true statements

therefore:

(C) There exist objects denoted by those expressions (i.e. there are abstract objects).

This argument works roughly for the existence of all abstract objects including legal ones. Clearly its power lies in the semantic role that singular terms assume within the context of statements³⁹. This role consists in determining the truth-conditions of the statement in the sense that the statement's truth values can only be stated if the referential role of the relevant singular term is taken seriously (in Hale's words if '... the singular term discharges its referential function'⁴⁰). Stated in this way, the semantic role of singular terms appears to have a robust ontological implication: namely that there must exist objects to which the one or the other singular term refers. This picture gives the impression that the required objects have to be endorsed in a strong externalist/referential way if the inference from the semantic role of singular terms to existence statements about objects of some kind (in our case abstract legal objects) is to be valid. That need not be a problem as long as this requirement is understood under the cupola of the semantics-exhausts-ontology thesis and its concomitant rejection of representationalism. If, though, the claim goes as far as to maintain that actually the existence of objects can be separated from the semantic role that the relevant terms exhibit within judgements, then the Fregean argument collapses and in its place re-emerges the barrier that keeps the mind apart from the world.

To avoid such undesirable effects, one will have to argue that the semantic role of

37 Vide Coyle, *ibid.* 89-90. Vide also Hale, *Abstract Objects*, Philosophical Theory Series (Oxford: Blackwell, 1987), 10.

38 I use the argument as stated in Coyle, *ibid.* 89, however without limiting the conclusion to numerical expressions.

39 Vide Hale, *Abstract Objects*, 12.

40 *Ibid.* 12.

legal singular terms is adequate for grounding existential claims about legal objects without any additional allusion to the primacy of reference. This conclusion can be established by showing first that the semantic-role argument is self-sufficient without being circular and, second, by addressing the issue of realism in the light of the rejection of the mind-world dualism. Of course, these two issues are not independent of each other. Any explication of objecthood that is motivated by the assumption that the logical structure of judgements ‘supervenes’, as it were, upon the referential function of object-terms is postulated or, stronger, only makes sense, against the supposition of a realist ontology that is essentially dualist. Put this way the referential explication of objecthood and some sort of robust dualistic realism will always go hand in hand. That we do not really need to buy into this problematic package is going to be the conclusion of a two-part argument discussed under the label of the issue of circularity and the issue of realism respectively. This will essentially show that the rejection of the mind-world dualism and the attendant idea of mental interfaces is sufficient in dismantling both the necessity for a strong realism and the idea of a reference-based explication of objecthood.

The issue of circularity

In this section I attempt to tackle in more detail a problem that was first addressed in section 3 of this chapters concerning the possibility of a semantic explication of the concept of reference that does not rest on that concept (circularity). Put in other words the problem identified here refers to the degree to which it is possible to explicate the notion of objecthood and reference by using only the objective logical structure of judgements. Since this structure is what makes judgements truth-evaluable, the problem can be restated as involving the possibility of an explication of reference through the notion of truth that, in its turn, is not informed by the notion of reference! If such an explication is possible we will have made a decisive step towards establishing the semantics-exhausts-ontology thesis and the *a priori* status of the structure of thought. In arguing for such an explication I will refer to a formal-logical way of dealing with the problem of circularity.

The issue of circularity can be thought as involving two levels. The first, somewhat formal, level concerns the ability to account for something’s being a singular term without resorting to the notion of reference. The second level deals with the preliminary question whether reference can be captured in terms which are independent of the structure of thought, and hence whether it can provide for a more primitive notion of objectivity than the one supplied by the logical structure of thought. This is the issue of realism/Platonism in its

various forms.

As indicated the Fregean argument on abstract objects needs to be supplemented by an account that would provide a means for identifying singular termhood for a term *t* independently from the notion of reference⁴¹. Hale bases this independent means on a series of criteria supplied by Dummett in his *Frege: Philosophy of Language*⁴². The underlying idea in those criteria is that there are certain patterns of inferential reasoning which are valid when singular terms occupy certain positions in their premisses or conclusions, whereas they are invalid if this is not the case⁴³. Here are the original criteria formulated by Dummett:

t is a singular term if and only if,

for any sentence *A(t)*, the inference from *A(t)* to 'There is something such that *A(it)*' is valid

for any sentences *A(t)* and *B(t)*, the inference from *A(t) & B(t)* to 'There is something such that *A(it)* and *B(it)*' is valid

for any sentences *A(t)* and *B(t)*, the inference from 'it is true of *t* that *A(it)* or *B(t)*' to '*A(t)* or *B(t)*' is valid

Though these criteria are adequate for a large number of cases it appears, as Coyle observes, that they involve serious problems in choices of *A(t)* and *B(t)* that contain opaque contexts⁴⁴. These are, roughly, contexts of utterance in which transparency of reference and transitivity of identity are not preserved. These contexts involve propositional attitudes like believing, wishing, etc. Imagine someone's, say Nigel's, belief 'that Santorini is an island in the Aegean sea'. This belief is true; but unbeknownst to Nigel, Santorini is identical with Thira. From these true premisses it does not really follow that 'Nigel believes that Thira is an island in the Aegean sea'. Here the opacity of the context of Nigel's belief does not preserve transitivity of identity. Cases of opaque contexts are not a rare phenomenon, particularly in the domain of legal discourse, and since they are prone to undermine an account of singular termhood concerning legal expressions, a more refined account of Dummett's crite-

41 I owe this part to Sean Coyle and his analysis in his dissertation, 'Foundations of Legal Reasoning', 90-93. Without his help I would certainly have missed the importance of this aspect of the argument, as it exceeds by far my competence in logic.

42 Vide Coyle, *ibid.* 90.

43 Coyle, *ibid.* 90.

44 For a more comprehensive discussion of the problems that arise from opaque contexts, cf. Coyle, *ibid.* 91.

ria is called for; Such an account, however, escapes the limits of the dissertation⁴⁵.

THE ISSUE OF REALISM

The Fregean argument for the existence of abstract objects depends, to a large degree, upon our ability to formulate true normative statements (premiss (p2) of the Fregean argument). Clearly this ability relates to the question ‘what makes legal/normative statements true?’, or the question about the truth-makers of normative statements. We need, in other words, to account for the things (referents) via which normative terms ‘discharge their referential function’, as noted earlier. At this point emerges the issue of realism: if we want to argue for the existence of abstract normative objects, we need to be able to account for the referents of normative expressions as being mind-independent, or as being outside the mind, belonging to the environment and, thus, possessing a fact-of-the-matter nature. Conversely, if the things at which normative statements target (i.e. their truth-makers), are of the mind’s making, then there is nothing that could make normative statements in an objective way true. Put in this way, the issue of realism seems to be largely about mind-dependence/independence of the referents of legal statements. It seems, in other words, that some form of realism or Platonism is an inescapable condition for the success of the Fregean argument about the existence of abstract normative objects.

Be that as it may, a closer look at the mind-independence issue will reveal that the latter does not need to go hand in hand with a realist ontology. This conclusion will be established mainly upon the remark that the semantics-exhausts-ontology thesis can guarantee objectivity (as mind-independence) without presupposing a realist ontology and the concomitant verification-independent notion of truth. In arguing for the above thesis I am going to distinguish between two conceptions of mind-independence, out of which only the second will be inexorably connected with a realist ontology and therefore will be considered as incompatible with the semantic transformation of ontology. There are two ways to lay down the claim for mind-independence:

- (a) according to the first, the claim for mind-independence is the rejection of the idea that we have internally represented necessary and sufficient conditions that determine the extension of a term/concept. This is roughly the claim that was attained by the externalist theory of

45 For a series of modifications in Dummett’s criteria in order to deal with the problem of opacity vide Coyle, *ibid.* 92-93.

meaning of Putnam and Kripke in the 1970s for names and natural kind concepts⁴⁶. For the legal theorist the problem that arises from this notion of mind-independence in relation to legal concepts, is whether legal concepts can be thought as natural kind concepts, or concepts whose referents are part of the external environment as a matter of fact. Normally the objection the legal theorist is confronted with, is that legal concepts are stipulative concepts, or of the mind's making, with the effect that there is no real difference between what we think legal properties are and what they in fact are⁴⁷. This notion of mind-independence reconstructs truth and objectivity against the background of the antithetical pair: intention-extension.

- (b) The second notion of mind-independence is much more radical: here independence is conceived in relation to our way of gaining knowledge about the environment. On this stipulation, something is mind-independent if its being the case, is independent (hence beyond) our ability to verify it. Basically the issue here is that mind-independence means that truth is 'external to our judgements/language', whereas mind-dependence means the opposite. On this conception truth and reference are conceived against the background of an environment which in principle extends beyond our ability to verify it, in the sense that our ability to verify things is not a sufficient condition for the existence thereof. This conception of mind-independence reconstructs truth and objectivity as signifying verification transcendence.

On a first glance the two conceptions of mind-independence seem to entail each other: that is, only if we presuppose that the extension of, say, a concept is independent of/lies outside our judgements it is possible to have an objective or mind-independent notion of truth; and the other way around: all concepts whose truth conditions can be laid down in definitions, are products of our intentional apparatus and therefore not true as-a-matter-of-fact. But this coupling of the two senses of mind-independence, and derivatively of truth and objectivity, is by no means necessary. One reason for this is that the first meaning of mind-independence includes merely an epistemological claim, namely the claim that it is possible to distinguish between analytic and synthetic truths. Conversely, the second notion of mind-independence entails a much stronger metaphysical claim, namely the claim that truth requires the existence of an external (to our judgements) world. Apparently one can attain to the first conception of mind-independence without succumbing to the metaphysical aspect. For the next couple of sections I will try to show first that the metaphysical version is incompatible with the semantics-exhausts-ontology thesis and, second, that we still need to

46 For a quick survey of those theories vide E. Margolis and S. Laurence (eds), *Concepts* (Cambridge Mass., MIT Press, 1999), 21-23.

47 Vide Stavropoulos, *ibid.*, Ch 4.

preserve the epistemological distinction between the extension and the intension of concepts.

Which realism?

More or less, the line of argument against the realist ontology draws upon thoughts already discussed in relation to the objectivity of the structure of thought. The idea of an external world whose existence lies beyond our ability to verify it, relates to the desire to account for something that makes our statements true in an objective way. According to this longing the objectivity of our knowledge follows from the existence of objects that are located in an environment that is external to our minds and our intentionality (transcendental or metaphysical realism). This somewhat naïve version of realism takes objectivity to supervene on objecthood with the result that truth relies on reference. Accordingly, the metaphysical realist is someone driven by the common-sense intuition that our thoughts and our linguistic structures can be objectively true only if there is a distance or 'slack' between them and the things that make them true. Justified as this idea might appear to be, it has an unexpected detrimental effect: it undermines objectivity by inducing a radical gap between the mind and the world. In other words, we can never be sure if our intentional states, beliefs, desires and so on, ever succeed to make contact with the environment. Notoriously this gap will, sooner or later, require some form of representationalism in order to be bridged⁴⁸. Either that or one will have to abandon any effort to account for intentional human behaviour and the normativity of thought. In either case the price to be paid is high: it is the loss of any possibility for objectivity.

To this version of realism is usually juxtaposed some form of anti-realism as being more successful in accounting for objectivity in the domain of truth and knowledge. An anti-realist candidate which appears particularly promising in this respect, is some variant of (Kantian) transcendental idealism⁴⁹. According to it the existence of the physical world is rendered relative by its subjection to pre-given categories and schemata of experience and its subsequent incorporation into the form of *Urteile* (judgements). The categories and further the *Urteile* (judgements) constitute the conditions for the existence of the physical world (*Gegenstände* or objects) which cannot exist independently of them; up to this point transcendental idealism implicates an ontological relativism. However, relativism at the

48 Vide the detailed discussion in Ch II, sections 7 and 8, *supra*.

49 For a critical presentation of (Neo-) Kantian transcendental idealism, vide C. Heidemann, *Die Norm als Tatsache*, 266-272.

ontological level does not amount to relativism at the level of truth and knowledge: the relativisation process that experience undergoes through the implementation of the categories or the *Urteile* seems to amount to a non-sceptical conception of truth and knowledge, since – according to what can be alleged to be the implied premiss – the transcendental conditions of experience are taken to constitute a common denominator, or something like the objective limits of truth and knowledge, for all perceivers. According to this Kantian or rather Neo-Kantian view it is absolutely consistent to accept both the thesis that objects cannot exist independently of their incorporation into experience or into the form of valid *Urteile* and the thesis that truth is not at all relative⁵⁰. Truth in this case will be constructed along the lines of the Tarskian convention T (as, for instance, in the sentence ‘the earth is round’ is true, if and only if the earth is round). This verificationist version of anti-realism need not be very strong⁵¹; an anti-realist could accept the possibility of true sentences that are not (yet) known. What the anti-realist would object to, however, is the existence of true sentences that are, in principle, unknowable (this second thesis is considered to be accepted by a realist). According to this explication transcendental idealism presents itself, on the level of knowledge, as a case of empirical realism. From a Neo-Kantian point of view this version of antirealism is advanced as an attractive alternative to transcendental (or metaphysical) realism, which holds that the conditions of experience (space and time) exist as such, a fact which further amounts to the belief that objects exist independently of the perceivers’ experience (the Kantian ‘Ding an sich’)⁵². The challenge which the realist must meet is to find a way to bridge the gap between his private world of sensations and the objective independent reality constituted by the independent co-ordinates of experience. The strong notion of reality, in other words, which transcendental realism nurtures increases by far the possibility of private sensations failing to grasp the external reality. Insofar ontological realism amounts to empirical idealism and scepticism about the external world.

50 Vide, *ibid.* 271.

51 Verificationism in this context means simply that understanding a sentence consists in grasping the sort of information states that would verify it. As such this version of verificationism is weaker than the one tendered by Logical Positivism; the latter contains the claim that a sentence is true only and only if there is actually evidence that warrant its assertion.

52 It is worth noting that Kant’s talk of the D.a.s is a very ambiguous part of his philosophy and indeed provides the ground on which Kant could be judged as being a realist. However, the sort of realism that could be ascribed to Kant is only of the metaphysical sort, since he denies the possibility of ever having epistemic access to the D.a.s. On the other hand it is questionable if even this sort of realism could be associated with Kant. It seems rather that the interpretation of the D.a.s. that fits best with the rest of Kant’s work is one that takes it to express an *abstract schema*: the object that is abstracted from all its features and properties, about which the only thing that can be said is that it is the

Metaphysical realism in this naïve version seems to completely succumb to the Myth of the Given⁵³ or the idea that the external world can guarantee the justification of our judgements on an objective, external ground, hence that our judgements do not fail to make contact with the world. In reality what this sort of realism amounts to is, as indicated, extreme scepticism and the loss of any chance of establishing any connection to the external world. But if this failure is clear in the case of naïve realism it does not seem to leave intact any form of antirealism either. In a more subtle form antirealism, or transcendental idealism has also to succumb to the Myth of the Given at the end of the day (in the form of verificationism). Antirealist epistemology needs also to get a reassurance that our judgements make contact with the world in a way that their justification has to incorporate ‘non-conceptual impacts’ from the external world into the space of the justifying reasons. This is where the Myth of the Given is revived again in the form of verificationism. However the interesting issue is whether the appeal of antirealism to external constraints, or the causal impact of the world, differs from the earlier, may be more direct and primitive, appeal of naïve realism. Or, put in different terms: ‘to what extent does this appeal constitute a proper justification’? John McDowell puts it very elegantly when he says that what this appeal to the Given amounts to is a brute impact of the exterior for which we cannot be held responsible:

But it is one thing to be exempt from blame, on the ground that the position we find ourselves in can be traced ultimately to brute force; it is quite another thing to have a justification. In effect, the idea of the Given offers exculpations where we want justifications⁵⁴.

According to this critique, all antirealism can offer are exculpations instead of justifications. Insofar antirealism does not seem to constitute a better alternative to naïve realism (or what has previously identified as rampant Platonism). Both positions seem to be trapped in a fruitless dualism which needs to be compensated by the appeal to the Myth of the Given.

In contrast to both metaphysical or naïve realism and some form of anti-realism, a transformation of ontology performed along the line of a non-representationalist intentional realism which upholds the normative significance of the structure of thought, is in the position to maintain objectivity and truth without retreating to a radical mind-world dualism that is unable to account for truth and knowledge in an objective way. This transformation of

object. For a detailed discussion of these issues vide Heidemann, *ibid.* 261-266.

53 Vide J. McDowell, *Mind and World* (Cambridge Mass.: Harvard University Press, 1994), 4 n..

ontology through the semantics-exhausts-ontology thesis re-locates the criteria of objecthood within the objective structure of inferential judgement formation. Thus the criteria for correctness of our statements about the environment are given through inferential reasoning. This is so, not because we cannot have anything better than a judgement-related objectivity, on the supposition that we can not make contact with the world. It is rather so, because in a non-dualist picture, the natural environment is necessarily implicated in the constitutive account of content as being generated through judgement-formation. That is, the content of our intentional states already is shaped in accordance with the way the world is (as revealed through other intentional states within chains of reasoning). To make use of a somewhat audacious expression, the standards of truth and correctness are at the same time external while *already in-the-judgements*. Now the difference is that this externality has to do with what is objective (as opposed to subjective) in a logical sense, as Frege tried to imply. 'Logic', or the structure of thought, seen this way, is no more than the structure of the world which impinges upon us 'from outside' and which we need to master in order to reason and learn to form judgements properly.

Mind-Independence anyway

The move towards grounding objecthood and reference on objectivity and logic renders the second of the two senses of mind-independence obsolete or even mistaken. Be that as it may, the semantic explication of reference is still perfectly compatible with the first notion of mind-independence, the one which is based on our ability to distinguish between something's being of the mind's making or not. To be more precise, the talk is here of the ability to distinguish between terms whose meaning is fixed by their intension and those whose meaning is fixed by their extension. Accordingly, 'bachelor' is a term, whose meaning can be given through an analytic, intentional definition ('unmarried man'), whereas 'Moon' is a term whose meaning is fixed by its extension, i.e. the actual body in space which revolves around the earth. This distinction is perfectly intelligible and necessary within the framework of a semantic transformation of ontology. It is intelligible because a judgement-based explication of reference still makes the distinction between judgements that are about things that are mental constructions or mind-dependent and those that are parts of the environment or mind-independent. An ontology which is exhausted in semantics still can tell apart the mind and its artifacts from the environment and, for this reason, can make the distinction

54 Ibid. 8.

between the extension and the intention of a concept/term. Cyclops are certainly creatures that do not exist as part of the environment, and for that reason the meaning of 'Cyclop' will be given by an (intensional) definition. On the other hand the meaning of the concept 'horse' will depend on the way horses are. 'The way horses are' will be laid down in a series of judgements which succeed in articulating the perceptual data about horses into coherent knowledge and, in this sense, they will be true. It is not false to depict the whole process by saying that a true judgement about elements of the environment is no more than the way of uttering perceptual data according to the structure of the thought and without contradicting previous judgements. Nevertheless, in a judgement about the environment there will always be something like data involved, whereas this is not going to be the case when we talk about the features of Cyclops (unless we include here the information derived from mythology books). It is, more or less, this difference that makes the first notion of mind-independence also necessary, besides making it intelligible.

The foremost intention of non-representationalist theories about intentional content is to account for the *direct impact* of the environment upon the formation of our intentional states and not to ostracise it from this formation-process. The emphasis that such theories put on the *a priori* elements of intentional activity is not based on an effort to 'purge' those *a priori* elements of intentionality from the 'imperfect' environment; it is rather based on the belief that those *a priori* elements are part of the world. To that extent these theories are indeed realist in the sense that they accept that truth and reference are world/environment-involving. What they contest is the possibility of the world's being conceived other than being structured in our objective judgements. In this context we still need a notion of mind-independence which, even if it does not amount to a claim of verification-independence, it can still show that meanings are 'not in the head' as mental constructions, but have an objective dimension as they are connected with the way the world is made. For this purpose I am going to refer to the semantic explorations of Kripke and Putnam in the 1970s on the meanings of names and natural-kind words. Using an extension of the Kripke-Putnam semantic arguments over the meanings of legal and, broader, normative concepts, advanced by Nicos Stavropoulos in his *Objectivity in Law*, I further hope to establish the necessity of the notion of mind-independence within the context of any theory that subordinates ontology to semantics without abandoning the claim to objective truth and knowledge. In this way the objectivity of judgements as emanating through their structure will always imply that this structure is not a mental construction but has to be presupposed in order to make sense of our knowledge of a mind-independent world. In this sense the *a priori* element of thought

could be couched as constituting a part of reality.

(LEGAL) MEANINGS ARE NOT IN THE HEAD

In the 1970s Kripke and Putnam elaborated a series of arguments with the intention to undermine the up to that moment standard semantic views on the meaning of proper names and natural kind terms⁵⁵. Those views can be labelled as the *descriptivist* or the *definitional model* and contain, roughly, the claim that in order for one to be linguistically competent with a term, one must know a description/definition that counts as the meaning of the term and picks out its referent. This linguistic claim amounts, on the level of thought, to holding that for every concept we possess internally a set of necessary and sufficient conditions that determines the extension/reference of that concept. These sets of conditions work, more or less, like analytic definitions, that determine in a somewhat *a priori* way the extension of every single concept. Thus, the definition model maintains that the meaning not only of concepts like 'bachelor' or 'triangle' but also of others like 'lemon' or 'tiger', in fact of any concept, can be given through analytic definitions that determine the extension thereof. Put in this way the meaning of any concept will be exhausted in its intension without any need to go and 'look' at its extension. In fact the later will always be given by the former.

Putnam and Kripke advanced a series of arguments against this counter-intuitive way of accounting for conceptual content. Their point was that the understanding of a large portion of concepts (natural kind concepts and proper names) does not result from analytic definitions but from our association with the referents (or the extension) of those concepts. The reason for this is that those concepts refer to things that are mind-independent, as opposed to mind-dependent sets of definitions. The arguments of Putnam and Kripke can be grouped in three categories⁵⁶:

- (α) An argument from error: often we are in the position to possess a concept in spite of being mistaken about the properties that we take its instances to have. For instance people in the 20th century take very different properties to form the instances of the concept 'thunder' than the properties that people in the 10th century took to do so. This fact notwithstanding, the ability to compare between what people believed to be the properties of the concept 'thunder' then and now, presupposes that their concept was about the same thing as ours. To that extent

⁵⁵ The two most important texts are S. Kripke, *Naming and Necessity* (Oxford: Blackwell, 1980) and H. Putnam, 'The Meaning of Meaning' in idem *Mind, Language and Reality* (Cambridge: Cambridge University Press, 1975). I mostly base my discussion of those views on Stavropoulos, *Objectivity in Law*, CHs 1 and 2; and Margolis and Laurence, *ibid.* 21 n.

⁵⁶ Margolis and Laurence, *ibid.* 21-22.

what is essential for the meaning of a concept is its extension rather than its intension. Accordingly, the intensional definition of 'thunder' in the 10th century might have been radically different from our definition, while the concept remains the same. This 'objective' dimension of the concept enables us to accommodate the possibility of error without the need to discard our concepts every time we discover we were wrong about the properties that we took to be instances of a concept⁵⁷.

- (β) An argument from ignorance: this is closely related with the argument from error and purports to show that ignorance of a series of properties corresponding to instances of a concept does not determine the extension of the concept. The fact, for instance, that people in the past were ignorant about a series of crucial properties of thunders, owing to the lack of the appropriate scientific knowledge, is not in the position to undermine or to alter the meaning of the concept 'thunder'. Here, again, the fact that a flaw at the level of intension of the concept, i.e. ignorance, fails to distort the meaning of the concept, is taken to point *e contrario* towards the conclusion that extensions rather than intensions are crucial for the determination of meaning.
- (γ) A modal argument: this argument purports to show that if an internally represented definition were to provide the necessary and sufficient conditions for the application of a concept, it would determine not just what the concept applies to as things actually stand, but also what it would have applied to in various possible counterfactual circumstances. The problem here is that often the conditions that people associate with the content of a concept are ones which, by their own lights, fail to do justice to the modal facts. Thus one could perfectly imagine circumstances under which a metal would not have its characteristic colour or other properties that we associate with that metal, but would still be picked out by the same concept. To take an example, gold in a gaseous state would lose many of its characteristic properties, yet gold-as-gas would still be picked out by the concept 'gold'.

In all, the driving force behind Putnam's and Kripke's work is the intuition that our concepts are amenable to revision because their content/meaning is fixed not according to internal psychological definitions, but in reference to the mind-independent things that those concepts are about. And there is always space for discovering new facts about those things. This is particularly the case with natural kind concepts. For those concepts definitions cannot be used as a definitive criterion in order to determine their content-as-extension (even if in many cases definitions correctly do so). Instead Putnam and Kripke put forward a theory

57 Extending this argument to legal and other normative concepts, presents us with a solution to Hart's radical indeterminacy thesis which he took to be the only possible conclusion of the open texture discussion. Vide the discussion in Ch I, *supra*.

which attempts to give an account of concepts' content by acknowledging the importance that extensions play in determining meanings. Their model is, roughly, that a natural kind term exhibits a causal-historical relation to a kind and that the term refers to all and only members of the kind. Thus, to take the case of 'gold' again, the assumption is that gold constitutes a kind and that, having introduced the term and having used it in connection with instances of gold, the term refers to all and only those pieces that are out of gold, regardless of the beliefs of the speakers who use it.

ARTIFACT KINDS AND LEGAL KINDS

In trying to expand Putnam's and Kripke's arguments to normative and evaluative concepts, legal or moral philosophers typically face the objection that the properties picked out by those concepts are mind-dependent with the effect that they do not constitute part of the world 'as-a-matter-of-fact'. Contrary to natural kind concepts, the objection goes, normative concepts' meaning derives through definitions which are products of human minds (conventions, etc.) and not through their picking out any real or objective properties. This gives rise to the reproach that in the case of normative or evaluative concepts we cannot distinguish between correct and wrong application of the relevant concepts in an objective way, as it is the case with natural kind concepts. This criticism appears to presuppose a realist standpoint of view that endorses a view according to which truth and reference are verification-transcendent and are located outside mind's cognitive efforts⁵⁸. However, to the extent that the previous discussion located the distinction mind-dependent/mind-independent within the context of a judgement-furnished conception of reference, the above criticism is also available within that context. Because even in the context of a judgement-dependent notion of truth and reference it is possible to distinguish between correct and wrong applications of a concept, or between correct and wrong attributions of properties to concepts through judgements.

According to a common objection, mind-dependent normative properties or entities are conceived as 'artifacts'⁵⁹, or constructions of the human mind. The argument runs here as follows: Putnam's and Kripke's extensionalist theory of meaning cannot be applied to 'artifacts' because their essence or nature does not depend on anything external to the purpose they are created for. This purpose, further, is totally mind-dependent and can be ex-

58 This is, to my understanding, the way Stavropoulos discusses the objections from mind-independence in his *Objectivity in Law*, Ch.4.

haustively reported of by an analytic definition. Thus, the meaning of the concept ‘umbrella’ is not answerable towards any facts other than a definition ‘X Y Z’ that accounts for its purpose. Hence the extension of any term concerning an artifact will be sufficiently given by the relevant definition and not the other way round.

Putnam is not unaware of this line of argument. In fact he contends that artifacts are well within the scope of his extensional semantics. In order to demonstrate this he constructs a thought experiment⁶⁰. He imagines a universe which is in all respects like ours with the exception of pencils (an artifact kind). In this universe, which he famously labels ‘Twin Earth’, pencils are living organisms rather than manufactured objects. Now Putnam’s claim is that though speakers on both Earth and Twin-Earth use the same intensional definition in order to pick out the objects ‘pencils’, the extension of the term ‘pencil’ is not determined by that definition: pencils on Earth are manufactured objects whereas on Twin-earth they are living organisms. Accordingly, an Earthian is expected to say that pencils on Twin-Earth are not really pencils, if he ever were to observe closer a Twin-Earthian pencil. With this move Putnam purports to show that even if on both Earth and Twin-Earth speakers’ intentions are the same, the extension of the concept they use might vary according to how things are as-a-matter-of-fact.

But even if one takes the Putnam–Kripke semantics to accommodate the objection from the artifacts, there is another objection lurking, as Stavropoulos mentions⁶¹: The objector might concede that the extension of a concept might be ‘determined’ by the underlying nature of the artifact concepts, yet proceed to observe that this nature is ‘functional’ in the sense of being always answerable to a definition. Thus, whatever serves a purpose or the function of, say protecting from the rain will count as an umbrella. Of course, the objector will admit, there are many ways to realise this function and, given the complexity of the forms of interaction between the environment and any purpose, many new ways of realisation will arise. The point is, though, that the underlying nature of the artifact-concept will be exhausted through the relevant definition. Hence any novel way of realisation will be answerable to that definition. As a result, all one needs to know in order to grasp the meaning of an artifact-concept or other mind-dependent concept is its underlying purpose which can

59 Vide Stavropoulos, *Objectivity*, 85-86.

60 Vide Putnam, ‘The Meaning of Meaning’ in idem, *Mind, Language and Reality. Philosophical Papers volume 2* (Cambridge: Cambridge University Press, 1979), 242 n. (first publ. in K. Gunderson (ed.), *Language, Mind and Knowledge*, Minnesota Studies in the Philosophy of Science, VII (Mpls: University of Minnesota Press)).

61 Stavropoulos, *ibid.* 86 n.

be captured in a lexical definition: ‘...the compliants of artifact terms are answerable to the definition, rather than the other way round’⁶². But a Putnam-like theory of meanings does not really need to resist this line of argument in order to sustain that definitions are answerable to concepts’ extension. Even if the extension of some concepts can indeed be specified by an underlying function there still remains to be examined if individual cases satisfy that function. If a case of what passes as an umbrella turns out to be a living organism then we would stop calling it ‘umbrella’. In other words, the criterion that will decide whether a concept’s meaning can be sufficiently accounted for in terms of a functional definition (artifact-kind concept) or, instead, by looking into the properties of its compliants (natural kind concept), will always depend on the concept’s extension and not on an *a priori* definition.

In defending this line of argument, Stavropoulos remarks that the crucial point regarding the content of artifact-concepts or other mind-independent concepts is not whether they might have been introduced through a definition but whether that definition captures some properties about which discoveries and corrections are possible⁶³. Insofar it is true that ‘murder’ or ‘contract’ are not mind-independent entities the way natural kinds like stones or apples are; this does not entail, however, that they are ‘of the mind’s making’ to the effect that they cannot ‘fail to be transparent to minds’ efforts⁶⁴. In order that the artifact argument establishes the desired dependence of artifact kinds from minds it is not enough to employ merely a concept of casual dependence. That artifact kinds and the relevant concepts’ content are causally depending on the beliefs of their designers or inventors does not amount to their being exhausted in those beliefs. For that one needs to deploy a more robust notion of dependence (some form of constitutive dependence) whereby artifacts’ nature is constituted by their designers’ beliefs to the effect that this nature cannot fail to be what we think it is⁶⁵.

NORMATIVE JUDGEMENTS AND MIND-INDEPENDENCE

The preceding discussion has made clear that normative properties and generally entities can be mind-related, or mind-dependent *lato sensu*, without being of the mind’s making, or mind-dependent *stricto sensu*. Even if it is possible to introduce normative concepts through definitions, their content will not be exhausted in those definitions, namely it will not be

62 Ibid. 86.

63 Ibid. 88.

64 Ibid. 89.

65 Vide Stavropoulos, *ibid.* 89.

analytic. It will always depend on their picking out certain properties and therefore it will be responsive to any new discoveries concerning those properties. Put in the context of a judgement-furnished ontology, mind-independent properties/entities are disclosed only within judgements as opposed to being beyond our ability to verify them. But those judgements are not analytic definitions or, in any other sense, statements about things in minds⁶⁶. Treating them as such is a major misunderstanding that owes its origins to the mind-world dualism and the concomitant need for intermediaries that allegedly secure some kind of contact between the two. According to this idea⁶⁷ content is individuated by some form of mental images (ideas, etc.) which are faithful representations of things that exist outside minds. Some of those representations correspond to genuine counterparts in the environment where others do not. Thought (and language) can access directly only the representations and therefore have only an indirect contact with the environment. Clearly in this picture our judgements are not very reliable since they are indeed 'trapped' in the mind, and the whole issue of content turns upon the way representations make contact with the world. In that case it is indeed true that certainty about what exists independently of our minds depends upon the way the intermediaries 'hook on' to the environment. The problem with this whole way of picturing content is that representations and other mental images are themselves located in minds, hence there is no reliable way to find out which of them are merely of the mind's making and which are faithful representations of the environment. As a result, our judgements will be unreliable not only with regard to those representations that correspond to nothing 'out there', but also with regard to those that do correspond to something.

Conversely if one does away with the dualist model, judgements are conceived as being about the environment. And in this case it is, of course, possible to distinguish between a definition that captures some functional or other features of a concept and a judgement that refers to extensional properties picked out by the same concept. The criterion here is that a judgement of the second kind will always provide us with additional or genuine

66 Definitions can be taken to perform a semantic reduction of normative concepts in a way similar to that other non-normative psychological concepts do (like in the case of emotivism or even projectivism). All these semantic reductionist moves rest normally on some form of eliminativism that holds that there are no genuine properties in the target domain of normative concepts. Very often those forms of eliminativism amount to the complete elimination of normative concepts and their substitution through concepts that are able to pick out genuine properties (in this case properties of mental or psychological states). All these moves can be blocked through the anti-reductionist arguments that were discussed earlier. Nevertheless it is purposeful here to address the issue of definitions separately to the extent that it relates to the subjectivity objection from mind-independence.

knowledge concerning the content of the same concept. This can be demonstrated by using an example from the area of *colour*. Colour concepts are often compared with normative concepts to the extent that colour properties constitute secondary qualities of objects, or properties that do not exist independently of perceivers' powers but are conceptually linked to experience. Imagine someone, say John, who spent all his life in a black and white room studying all aspects of colour in great detail to the effect that he came to know all definitions and descriptions of how and in what way different surfaces reflect light in order to produce the different colours and their variations⁶⁸. One day John exits his room and the first thing he comes across is a patch of green grass. And he exclaims 'Ah! This is 'green''. Such a judgement which involves the environment is adding a new portion of knowledge in John's colour expertise, regardless of the fact that he already knew all definitions concerning 'green'. This case can easily be transferred to the field of normative experience/knowledge. Regardless of whether one has the most perfect definitions for legal concepts, a judgement about something's being a contract or someone's conduct being 'lawful' or 'unlawful' or someone's being a 'successor' or 'beneficiary', will increase one's amount of normative knowledge. Insofar normative judgements are not about things in the head.

Further objectives

Chapter IV continues the discussion on the mind-independence of legal (abstract) objects. In *the first half of Ch 4* I offer a more detailed account of the referents of legal expressions and the truth-makers of legal sentences. For that I employ a semantic explication of the truth of *legal sentences* within the spirit of the semantics-exhausts-ontology thesis. Accordingly legal referents and truth-makers will be accounted for in the context of true legal sentences, where truth will be given along the lines of a semantic theory of truth (akin to *Tarski's* semantic theory of truth). In that context whole legal norms, as corresponding to legal sentences, are explicated as constituting normative *facts*, as opposed to the single normative objects that are denoted by legal concepts like 'contract' or 'person'.

In *the second half of Ch IV* I will introduce the issue of the *interconnection of on-*

⁶⁷ Vide the discussion in Ch II, *supra*.

⁶⁸ The example paraphrases a similar example from F. Jackson 'Epiphenomenal Qualia', in *idem Mind, Method and Conditionals*, International Library of Philosophy (London: Routledge, 1998), 57-69 (first published in *Philosophical Quarterly*, 32 (1982), 127-136); vide also in the same volume his 'What Mary didn't know', 70-75 (first published in *The Journal of Philosophy*, 83 (1986), 291-295). And the anti-reductionist argument based on the same example in Michael Tye, *Consciousness, Colour, and Content* (Cambridge Mass: MIT Press, 2000), 4-5.

tology and agency which will be the prevailing issue for the rest of the dissertation (part three). This will be canvassed against the background of three interlocking issues:

The idea that our linguistic structures can account for ‘what exists’ (semantics-exhausts-ontology thesis) is only tenable if the content of our thoughts (*intentional* or *mental* content) is world involving (the idea of anti-representationalism or non-dualism).

I will argue that for thought-content to be world-involving a required condition is that it is shaped through intentional agents’ interaction with the environment. This requirement bestows the concept of interaction with fundamental importance for the account of thought-content, hence ontology, for at least one reason: what will be *possible* in the domain of thought and ontology will be *normatively constrained* by what will be *permissible* in the domain of the interaction with the environment (or broadly the domain of agency⁶⁹).

Put in those terms the issue of the interconnection between agency and ontology will play a central role in demarcating the ontology of normative objects. Normative objects (rules and other abstract entities) trivially refer to the guidance of action. Hence any investigation into the concept of agency will be essential for specifying what normative objects exist. In conjunction to this point, I will further argue that any investigation into the concept of agency will amount to disclosing the pragmatic requirements (rules) that conceptually constitute ‘agency’ both in its various local forms (particular practices or institutions) as well as in its more far-reaching form of *a universal practice of communication* which is anyway presupposed by those local forms (part three of the thesis).

69 I prefer ‘agency’ to ‘interaction’ because the former concept incorporates the *substantive aspect* of the interaction with other intentional agents. This kind of interaction is precisely what generates the normative (in the sense of action-guiding) constraints of intentional action. For further clarifications of these concepts refer to Ch IV.

CHAPTER IV

LEGAL TRUTH, NORMATIVE FACTS AND AGENCY

INTRODUCTION

Chapter III suggested that the notion of mind-independence can be conceived as merely signifying our ability to distinguish between *that which exists beyond our will and our minds' inventive powers* and *that which is 'of the mind's making'*. Further, it was argued that this ability is readily available without any need to presuppose a robust metaphysical realism that conceives the environment or the world independently from our thought and language (as representationalism does).

This chapter continues the effort to demarcate the issue of mind-independence in law by accounting for the concept of *reference* in the context of a *semantic conception of truth*. The semantic conception of truth is in a position to explicate reference within the inferential structures of language and therefore dispenses with a direct account of the referents of legal expressions and the truth-makers of legal sentences. The semantic conception of truth is elaborated within the framework of a version of the *semantic theory of truth*. This takes the environment of the sentence (or the judgement) to be decisive for an account of reference in general along the lines of the Fregean conception of truth and objectivity that was discussed earlier on¹.

In contrast the usual alternative for a theory of truth is the so-called *correspondence theory of truth*². A correspondence theory of truth takes sentences to be true in virtue of their correspondence to facts, where facts are considered to be parts of the environment that are characterisable independently of language and grammar. To that degree correspondence theories of truth are usually employed in the context of representationalist theories of thought and content. Hence, the main problem that any correspondence theory faces, is to explain why the world is made out of facts, while maintaining that those facts are charac-

¹ Vide Ch III, section 3, *supra*.

² For a brief account see Luntley, *Contemporary Philosophy of Thought*, 60-63. And for a more detailed accounts, vide Kenneth Taylor, *Truth and Meaning* (Oxford: Blackwell, 1998), Ch III.

terisable in a non-semantic way. The problem emerges because *facts* are not natural entities but 'entities' that are suited to be related to true judgements. Therefore *facts* presuppose that we have categorised the world in a way appropriate for making true judgements; but if the world has been 'cut' into facts then it has been already subject to the same categorisation as that of judgement, namely the categorisation of grammar. As a result the correspondence theory, in its representationalist version at least, will already rest on language, despite its claim to the contrary.

Contrary to what the correspondence theory of truth alleges the semantic explication of truth needn't make any concession towards idealism if thought-content is conceived as being world-involving, according to the idea of anti-representationalism. Anti-representationalism assumes that thought-content cannot be characterised independently of what it is about, i.e. the environment or the world. At the same time thought-content is structured according to the logical patterns of grammar. Hence it is possible to account for content (the world) through grammar. But in doing so one already accounts for what is the case. To that extent grammar aims to truth. Truth is the justificatory reason for the concept of logical grammar. Judgements are truth-evaluable in virtue of their embeddedness in patterns of inference which reveal the judgements' segmentation into distinct logical parts. As a result, the concept of truth can be analysed through the logical structure of grammar, as a semantic concept. In fact truth can be taken as constituting the basic semantic concept which mediates between logical grammar and the environment, to the effect that *ontology may be taken as supervening on logic*.

A BRIEF OUTLINE OF A SEMANTIC THEORY OF TRUTH

The basic idea of a semantic theory of truth is that the truth of judgements can be systematically computed from an account of their semantic structure. A semantic theory aims to show that the combinatorial structure of judgements, as revealed through the inferential patterns in which they are embedded, determines their truth conditions. Hence the definition of truth at which the semantic theory arrives is a recursive definition of truth³.

A semantic theory of truth aims to demonstrate how the truth-conditions of any

3 A semantic theory of truth will typically be modelled against the background of Tarski's theory of truth. For an account of the latter see Alfred Tarski, 'The Semantic Conception of Truth and the Foundations of Semantics' in S. Blackburn and K. Simmons, *Truth* (Oxford: Oxford University Press, 1999), 115-143; for further analysis vide Scott Soames, *Understanding Truth* (New York and Oxford: Oxford University Press, 1999), CHs 3 and 4; also Luntley, *Contemporary Philosophy of Thought*,

judgement expressible within first-order predicate calculus can be derived from an account of the structure of the judgement in conjunction with an assignment of semantic values to the judgement's components. Any judgement in natural language which is expressible in first-order predicate calculus, will be amenable to a transparent display of the judgement's logical grammar. To that extent the semantic theory draws upon the *syntax of a language*, or the logical rules according to which something is a well-formed sentence in that language.

For any sentence *S* of a language *L* the semantic theory will provide a systematic account of what it is to say of *S* that it is true in *L*. This account will be recursive in the sense that it will give the truth conditions of the sentence by ascribing semantic values to the atomic components of the language. A further condition is that the account of what it is for *S* to be true in *L* will be given on the meta-level of a meta-language *ML*. That is, the sentences within which the truth conditions of *S* will be specified will be sentences not of *L* but of *ML*. Thus for any *S* in *L* the conditions of its being true will be given in the *ML* according to the clause:

(1) '*S*' is true if and only if *p*,

where *p* are the conditions specified in *ML*. Here both the name '*S*' as well as the predicate 'is true' do not belong to *L* but to *ML*. Further the condition given in *p* will be a way of expressing in *ML* what is for any sentence of *L* to be true. This would roughly amount to a translation of each of the sentences of *L* into the *ML*. In that way clause (1) will provide an explication of the predicate 'being true in *L*' for any sentence of *L* by drawing upon the recursive definition of the syntactic structures of *L*-sentences.

Let us take *L* to be a fragment of, say, German whose atoms are whole sentences and *ML* to be English. Then the specification of the truth-conditions of the *L*-sentence 'der Tisch ist schwarz' will be given by:

(1)' der Tisch ist schwarz' is true if and only if the table is black.

Along these lines, clause (1) provides the basic assignment of the conditions under which the atoms of a language possess a semantic value. When those atoms are taken to be whole sentences (as here 'der Tisch etc. '), then the assignment of the conditions under which they

possess a semantic value is already an account of truth-conditions, since in that case atoms are sentences and the semantic value of sentences is truth (or falsity). But the point of the semantic theory of truth needn't be as trivial as that. A semantic theory can gain the truth-conditions of any sentence *recursively*, by deriving them from the *semantic conditions* of sub-sentential units, that is without presupposing the concept of truth⁴. As a result, the truth-conditions of any sentence will be derived from the semantic conditions for singular terms and predicates. The semantic conditions for a singular term will be the conditions under which the term has a semantic value, namely the conditions under which it stands for an object (or, the conditions under which it refers). Similarly the semantic conditions for a predicate will be those under which it has a non-empty extension. Those conditions normally will have to be assigned on the base-level of the theory in an extensional way, namely by establishing a certain relation between the atomic units of **L** and the world. According to a standard characterisation, the assignment of semantic conditions will be given through the concept of *satisfaction*⁵. Along these lines, the concept of truth will be defined via the semantic conditions of sub-sentential units which, in their turn, will be satisfied in an extensional way on the base-level of the theory.

The 'extensional' satisfaction of the semantic conditions of sub-sentential units needn't be radically different from the 'satisfaction' of the truth-conditions of any sentence according to clause (1). Take for instance an atomic, sub-sentential unit: the name 'Tisch'. On the base level of our semantic theory, the name 'Tisch' will acquire a semantic value along the lines of the clause:

(2)' 'Tisch' refers to table,

or, in the general form:

(2) 'F' refers to F

By ascribing a semantic value, clause (2)' discharges the referential function of the name 'Tisch' in a way that can make true the statement 'der Tisch ist schwarz'; namely by presupposing the existence of the object table. In this sense it can be said that the formal con-

4 Vide Luntley, *ibid.* 64n..

5 Cf. *ibid.* 69-70.

dition for any expression F to refer, or for clause (2) to be true, is the possibility of formulating an existential sentence of the form $(\exists x)(Fx)$ [or in our example: ‘there is something that is a table’]⁶. Hence the formal condition of the possibility to refer to an object can be stated as:

$$(3) \text{ ‘F’ refers to } F \Leftrightarrow (\exists x)(Fx).$$

Whenever it is possible to write an existential sentence of the above form there is an object denoted by the expression F . Further, it is the case that any assertive sentence which contains expression F can be taken as having a referential relation towards the object denoted by expression F , in virtue of which the sentence is made true. Therefore one could skip, as it were, clause (2)’ and simply say that an assertion ‘refers’ to an object to the point that it is possible to restate the assertion as an existential sentence.

As a result, a semantic account of truth that is recursive will contain an account of reference for the sub-sentential units which will further amount to an account of the existence of the objects referred to. According to this account, any expression F (e.g. table) is thematised as an object through the use of its name ‘ F ’ (e.g. ‘Tisch’) within an assertive sentence (like in ‘der Tisch ist schwarz’). If, further, the sentence is true then there exists an object that is denoted by the expression. The formal conditions for that are exhausted in the possibility to rewrite the assertive sentence as an existential sentence within which the expression F functions as a predicate [in our example: ‘there is something that is a table’]. Put in more general terms: the existence of an object will be established through the employment of any assertive sentence which implies, *lato sensu*, an *affirmative existential sentence*. This method for accounting for the existence of an object can be regarded as complementary to the Fregean strategy that was exposed in the last chapter. In the Fregean strategy the existence of an object is granted when an expression exhibits the appropriate role (that of a singular term) within the context of a true sentence. Under the light of the present account one can add: *an expression exhibits the appropriate role when it is possible to restate the original (assertive) sentence as an affirmative existential sentence in which the expression under consideration functions as a predicate*. This extension is perfectly consistent with the listed criteria for singular termhood⁷ since the latter imply the possibility of

6 Vide the detailed analysis in Heidemann, *ibid.* 309-317.

7 Cf. with Ch III, sec 6 (‘Abstract Legal Objects’), *supra*.

forming affirmative existential sentences in which the candidate-terms for singular termhood function as predicates.

Regarding the 'extensional' definition of reference in clause (2) there are two further issues that are worth commenting on: the first concerns the alleged fundamental character of a definition of reference within a semantic theory of truth; why, in other words, should clause (2) be more 'basic' than the truth-clause (1), in the sense of being more suitable to establishing some sort of correspondence between language and reality? *Prima facie* it doesn't seem to exist any reason for that differentiation. But if this is the case then a further issue arises: do both (1) and (2) fall short of accomplishing the task of linking language with the world? The answer one is going to give to those two questions depends upon the stance one chooses to adopt towards representationalism. If we accept representationalism, then we assume that it is possible to characterise the language and the world independently of each other. If we do so, then it doesn't really matter at which level of the theory we undertake the task of re-establishing a link between the two (when defining truth and reference). Any level would be as futile as any other. Conversely, if we reject representationalism then, again, it does not really matter at which level we undertake to define truth and reference; this time, though, the reason is that the link between the language and the world is already there! It is the idea of anti-representationalism: that there is no such thing as a world or an environment that is not mediated by thought (language) and its categories. When we see through the looking glass of anti-representationalism two things strike us as natural:

First, that any account of reference or truth cannot but be semantic, as the only way to 'cut reality' is through grammar. Accordingly, it does not really matter which of the two, reference or truth, we are going to make the basic level of our account of how language and the world make contact; Because in anti-representationalism, the issue of contact has been settled at an earlier point, through the concept of grammar. Of course, as the previous chapter argued, it is probably more suitable to set truth at the basic level since the structures of grammar unfold predominantly on the level of sentences. Besides, the Fregean strategy demonstrated that a range of expressions denotes objects to the extent that they function as singular terms in true assertive sentences; this was further supplemented with the remark that the existence of an object rests on the availability of restating the assertions as existential sentences in which the singular terms function as predicates.

Second, not everything that is formulated in linguistic structures is a linguistic entity. In clause (1), the right-hand side is the fact of the *table's being black*, rather than being

a linguistic structure which is in need of making contact with something that can be captured independently of the structures of thought and language. The fact that the table is black is what makes the sentence ‘der Tisch ist schwarz’ true. Regarding this, a semantic account of truth does, after all, deliver a kind of correspondence theory, in a very different sense, however, than the traditional definition of the term. What is depicted by the right-hand side of the base-clauses are indeed *facts*; not in any metaphysical or representationalist sense, i.e. as being independent from grammar and language, but ‘facts’ as a category that makes sense only in the context of the structures of thought: ‘the facts appealed to are the facts as categorised by human thought and language, but so what? There is no other kind’⁸. Further, it is possible to recast those facts as higher-order (or abstract) objects through nominalisations of the sentences that depict them. This possibility will foster an account of legal norms as constituting objects available to legal science.

To summarise: a semantic theory of truth accounts for truth and reference on the basis of the semantic structures of language (grammar). To that extent, truth and reference are subjected to *the constraint of grammar*. The constraint of grammar is consistent with the idea of ‘anti-representationalism’ that chooses to individuate content through the structures of language. The constraint from grammar is the first constraint on truth and reference.

For the next few paragraphs, the constraint from grammar on truth and reference will inform an attempt to identify the ontological counterparts of legal sentences, singular terms and predicates. These counterparts will, roughly, include legal norms, legal objects and legal properties. The account will be guided by the thought that legal norms (as a species kind of legal objects) occupy a prominent position amongst the rest of the legal entities. This is upheld on two grounds: First, it is a central claim of the Fregean programme and the semantics-exhausts-ontology thesis that the structures of grammar are revealed within the environment of the sentence/judgement. Those structures can further generate, via a semantic theory of truth, a semantic account of the referents of the sub-sentential units. As a result, on the ontological level, facts will be more basic than objects and properties. Hence norms, to the degree they are delivered in sentences/judgements, will be more basic than other legal objects. The second, and perhaps more important, justification stems from the idea that any effort to reduce legal/normative entities to non-normative ones is blocked on the level of legal norms. That is, even if it is possible to reduce contracts and other legal objects or legal properties like ‘being under obligation’, to some non-normative entities or

8 Luntley, *Contemporary Philosophy of Thought*, 71.

properties, this is not possible for legal norms. Instead, any reductive account of legal properties or legal objects has to presuppose as non-reducible some legal norm in order to be able to make sense of the reduced objects and properties, as argued earlier⁹. Along these lines legal norms, as constituting a species of legal objects, are taken to be much more central for legal discourses than other legal objects (e.g. *contracts* or *marriages* or *persons*) or legal properties (like ‘being under contractual obligation’). In fact those objects and properties can be understood as existing only against the background of some legal norm. In other words, legal norms are what constitutes *the ontological bedrock*, as it were, of legal discourses. Any talk about law, that is, will have to presuppose at least the existence of legal norms as belonging to our environment.

THE OBJECTS OF LEGAL COGNITION

The possibility of denoting legal objects is fundamental for our ability to acquire legal knowledge. What performs the function of denoting are *linguistic* entities, in particular expressions and sentences; what is denoted are *non-linguistic* entities, in particular norms and other legal entities. The things denoted are the objects of legal cognition. Therefore an account of norms and other legal entities as constituting objects is central for legal knowledge.

An expression refers to a legal object if it functions as a singular term (names are included) within the context of a true sentence. Normally, on the supposition of a semantic theory of truth, a sentence will be true when there is a fact that makes it true. This fact will be stated in the right-hand side of a clause of the form ‘S’ is true iff S. When this is the case the relevant expression will also refer according to the clause: ‘F’ refers to F. The formal condition for that will be given through an affirmative existential sentence of the form: $(\exists x)(Fx)$. Take for instance the sentence ‘the contract between X and Y is valid’. In the correct use of this sentence, that is if the sentence is true according to the schema ‘S’ is true iff S, the existence of the object contract will be granted. It will be possible, in other words, to create the affirmative existential sentence: ‘there is something that is a contract’. This will be *mutatis mutandis* the case for all legal expressions that denote (abstract) legal objects.

Things are more complicated for norms. Norms are embedded in whole sentences, and sentences do not refer to objects the way singular terms do. Thus the problem of objectifying norms will relate largely to the problem of objectifying whole sentences. This is

9 Cf. Ch II, sec. 6 (‘the variety of normative nature’), *supra*.

where the account should begin¹⁰:

Sentences are the environment within which object-terms refer; moreover, they are the environment in which the existence of objects is articulated: an object exists in the correct use of an assertive sentence. This is granted through the correct use of an assertive sentence which entails the possibility of its restatement as an affirmative existential sentence. But can a whole sentence be considered as being an object in itself, according to the same method? Does in other words an objectivation take place if we insert a sentence(1) into another sentence(2) in a way that sentence(1) occupies the role of the object-term? Take, for instance, the sentence(1): 'the contract between X and Y is valid'. The correct use of sentence(2) establishes the existence of the object contract. Now let us insert sentence(1) in the following sentence(2) of a meta-language:

sentence(2): 'the contract between X and Y is valid' is true iff the contract between X and is valid'.

On a first blush, sentence(1) might be taken to function as an object-term within sentence(2): in this case, the object denoted by sentence(1) is the contract between X and Y. However, this solution seems to give rise to a discrepancy that is not easy to dispense with: if we take the contract between X and Y to be the object denoted by the objectivation of sentence(1), then what is the object denoted by the actual object-term 'the contract between X and Y' in the correct use of sentence(1)? In other words, it cannot be the case that both the term 'the contract' and the objectivation of sentence(1) refer to the same thing. Moreover, to say that sentence(1), a whole sentence, refers to the object contract is not very convincing. The problem emerges from the fact that sentences do not refer like object-terms but are merely used in a referential way, namely as providing the appropriate environment for singular terms to refer.

Heidemann¹¹ suggests an alternative way for arriving at a nominalisation of an assertive sentence that would allow to treat it as a singular term: this involves restating it as a 'that-clause'. In our example this would amount to the sentence 'that the contract between X and Y is valid'. This nominalised sentence can be easily inserted within a reference schema of the form 'S' refers to S:

¹⁰ The discussion follows, Heidemann, *die Norm als Tatsache*, 320 n..

¹¹ Heidemann, *ibid.* 309-336; vide also *idem*, 'Hans Kelsen's Conceptions of Normative Cognition and Legal Norms' (unpublished seminar paper, University of Edinburgh, 24/2/2000).

‘that the contract...is valid’ refers to (the fact) that the contract...is valid.

The role of the ‘that-clause’ in this schema is not merely to refer to a linguistic entity, i.e. sentence S, by constituting nothing more than the name of that sentence. Rather, it should be considered as referring to a non-linguistic entity or object. This becomes clearer if we employ a sentence on a meta-level, say, the sentence: ‘I am glad that the contract...is valid’. Here my being glad cannot really be associated with the linguistic entity ‘that the contract...’, but should be associated with some object denoted by the ‘that-clause’. In fact, the ‘that-clause’ can be taken to denote the same object that the noun-term ‘the validity (of the contract)’ would denote. This object is the fact that the contract...is valid. Thus my being glad is associated with the fact that the contract is valid. Put in more general terms, the objects denoted by nominalisations of assertive sentences in the form of ‘that-clauses’ can be called *facts*.

This analysis elucidates adequately the way facts are disclosed in the use of assertive sentences. To the extent that those assertions are about legal entities we are entitled to talk about legal sentences and legal facts respectively. Now, norms present us with a further peculiarity: besides being embedded in legal sentences they further express the modality of ‘ought’. Heidemann suggests that any normative sentence can be reconstructed as a second-order sentence in which the modality of ‘ought’ is related to some fact expressed in the terms of a ‘that-clause’, along the lines that the modalities of possibility and necessity do. Accordingly any normative sentence can be rephrased as:

(NS): It is required that x.

The second part of NS is a that-clause which depicts a fact. To that extent NS can be understood as being already a *second-order sentence* that states a *modal meta-fact*. A modal meta-fact consists in the fact that the relevant modality (here the modality of ‘ought’), is related in a specific way to a fact which is named by the ‘that-clause’. More specifically, to the degree that normative sentences were taken to correspond to norms, it can be argued that norms are modal meta-facts which consist in the fact that a first-order fact is placed under the modality of ‘ought’¹².

12 This is the solution that Heidemann opts for. Vide Heidemann, *die Norm als Tatsache*, 309n..

Overall, the semantics-exhausts-ontology thesis has generated an account of legal norms as constituting facts or objects of a higher order that are available to lawyers' cognitive powers. This explication of norms' ontological quality seems to make justice to Hart's account of the concept of law, as well as to the subsequent discussion of reductionism, which assumed that legal norms enjoy some degree of *ontic autonomy*. The semantic account tried to work out the metaphysical conditions for a perception of legal norms as irreducible or ontologically primitive. To the degree it succeeded to do so, normative sentences, and in particular their nominalisations, have to be envisaged as revealing norms as objects that belong to the environment. However, what the account has claimed is that norms are abstract objects and as such of a very different quality from concrete objects like chairs and tables, trees and mountains.

NORMS AS ABSTRACT FACTS AND NORMS AS INSTITUTIONAL FACTS

The present effort to account for the referents of legal expressions and broader to underpin law's ontological groundwork, shares some important insights with other contemporary accounts from the field of legal theory¹³. Prominent amongst them, owing both to its pioneering character and its widespread influence, is the so-called Institutional Theory of Law (ITL henceforth) which was launched through the work of Neil MacCormick and Ota Weinberger¹⁴. The ITL seems to be compatible with the main premisses of the philosophical programme of accounting for the ontological basis of legal discourse, that this thesis undertakes. To that extent, even if the thesis does not raise the claim to offer a detailed philosophical defence of the ITL¹⁵, it could be understood as advancing in more detail some philosophical points that are of focal interest to the ITL.

13 All these programmes appear one way or another to be efforts for offering detailed philosophical reconstructions of major positivist theories of this century: thus the Institutional Theory of Law and the account put forward by Sean Coyle stand in the tradition of Hart's theory of Law, whereas Carsten Heidemann's account advances a reconstruction of Kelsen's theory of law along the lines of something akin to a Neo-Kantian metaphysics of norms. An exception in this tendency is Nicos Stavropoulos' recent monograph, which attempts to offer a realist account of legal properties. For all these accounts vide, respectively, Sean Coyle, 'On the Foundations of Legal Reasoning in International Law', (unpublished doctoral thesis, University of Glasgow, 1998); Carsten Heidemann, *die Norm als Tatsache. Zur Normentheorie Hans Kelsens*, Studien zur Rechtsphilosophie und Rechtstheorie: 13 (Baden-Baden: Nomos, 1997); Nicos Stavropoulos, *Objectivity in Law* (Oxford: Clarendon Press, 1996).

14 Vide Neil D. MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, Law and Philosophy Library, vol. 3 (Dordrecht: Reidel, 1986).

15 For that one should consult the detailed work of Sean Coyle, 'On the Foundations of Legal Reasoning', fn 13, *supra*.

The similarities between the two programmes notwithstanding I believe that a semantic account of norms' ontology, one that presumably the ITL will want to agree with, cannot be reconciled with the positivist premisses that inform the philosophical programme of ITL. Instead, I am going to argue, the semantic account of norms' ontology has to amount to an account of norms' normativity (i.e. their action-guiding character) that is non-positivist, in the sense that it advocates that it is possible to acquire knowledge about law's evaluative or practical side. Accordingly the position argued for in this dissertation rejects the positivist separation between law and morals while endorsing a cognitivist attitude towards (legal) values. To put the difference in a condensed form, whereas the ITL claims that an account of the referents of legal discourse is possible independently of any specific values or substantive action-guiding principles that enjoy an ultimate justification, the account I advance will claim the exact opposite.

Having said this, I would not like to be interpreted as claiming that the ITL is insensitive to values or the principles of practical reason. On the contrary, ITL is a theory which, especially in its mature formulations¹⁶, takes great care to account for rules as facts that are 'created' within or by social practices that 'brim with value'. However, the ITL adopts a *quasi-instrumental* stance towards the evaluative element of norms in the following sense: it claims as a principal, that an account of legal rules and other legal facts, however informed by value it may be, it does not require the acknowledgement of any specific fundamental values or principles but just of those values and principles that *currently* inform social action. Hence the evaluative element in rules, or their internal aspect, is accounted for in the ITL only *relatively to some current value-system*, which does not raise any claim to *categorical* or *universal* validity¹⁷.

16 Vide in particular, MacCormick, 'Norms, Institutions, and Institutional Facts' in *Law and Philosophy* 17 (1998), 301-345.

17 In this respect the ITL is close to the Weberian ideal of a value-free analysis of values. In Max Weber's understanding, values are never a matter of knowledge but of decision. Scientific analysis in relation to values can only formulate objective judgements in respect to the specific connections between the values of a given value-system, but can never offer a rational justification for the ultimate values that support a given value-system. In Weber's words 'die wissenschaftliche Weltbetrachtung (vermag) zwar zu lehren, was man kann und was man will, nicht aber was man soll'; vide Weber 'Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis' in idem, *Schriften zur Wissenschaftslehre* (Stuttgart: Reclam, 1991), 27. It appears further that this view was dominant in the work of other German social and legal philosophers of the mid-war era; vide for instance, G. Radbruch, *Rechtsphilosophie* (Stuttgart: Koehler, 1973), 96; and, H. Kelsen, *Reine Rechtslehre*, reprint of the 1960 2nd edn (Wien, 1983) 1, 84.

In a nutshell, the idea behind the ITL is that it is possible to allow for the existence of non-material facts (or objects) against conceptual time-spaces (institutions) whose co-ordinates are set by normative commitments between agents. In those time-spaces one can locate all those non-material facts that render our normative discourses intelligible by fulfilling the referential function of normative language. The programme of uncovering the ontological foundations of legal discourse advanced by the ITL rests, roughly, on the following methodological premises¹⁸:

- a. The task of explaining and accounting for the existence of norms and legal institutions tries to steer between the Scylla of idealism and the Charybdis of reductionism. To that extent the ITL allows for the existence of abstract or ideal entities (institutional facts) but only in correlation with the material background of human action in specific social contexts. Thus the ITL endeavours to offer an ontology that is useful both for the explanatory work of the legal sociologist and the normative-doctrinal analysis of the legal scientist.
- b. Values are not excluded from the ontological account of institutional facts. ITL understands institutional facts as resting (or supervening) upon tokens of *meaningful* human action. To the degree that meaningfulness of action can be accounted for in reference to specific aims and values, institutional facts are taken to be invested with evaluative content. Hence the theory, in accounting for institutional facts, takes a *Verstehen* attitude towards those facts and tries to unpack the specific evaluative point that holds together the concrete institution(s) within which abstract normative facts substantiate. Having said that, ITL is far from being cognitivist in relation to values; it appreciates the need for taking values into account, but does not go as far as to endorse the possibility of an objective knowledge of values. In the context of ITL, values are understood more as a matter of attitude towards specific patterns of human behaviour than as something which it is possible to have knowledge about¹⁹.
- c. The central idea of ITL is that there are legal and social facts which are intelligible as non-material institutional facts. Institutional facts are facts in virtue of being statable as true

18 In offering a brief account of the aims and objectives of the ITL, I will mainly refer to the introduction co-authored by MacCormick and Weinberger from their *An Institutional Theory of Law*, 1-30. For any subsequent additions and improvements of the theory I will refer to MacCormick's 'Norms, Institutions and Institutional Facts', *Law and Philosophy* 17 (1998), 301-45. As a result Weinberger's view is not represented in this context. Furthermore the whole discussion has more the character of highlighting the main similarities between the ITL and the present account, rather than of exhaustively discussing ITL.

19 This view is already present in MacCormick's earlier monograph, *H. L. A. Hart*, as discussed in Ch. I, *supra*.

statements. What makes them true is not simply a part of the physical environment, but an interpretation of the physical environment *in the light of human practices and their underlying rules*. Here belong also certain abstract features or properties (labelled also ‘facts’ in the terminology of ITL) of material objects that are ascribed against the background of practices and the rules that support them (for instance the property ascribed to some piece of metal of ‘being the World Cup’; or the property of ‘being married’ ascribed to some person; or even the property of ‘being a person’ ascribed to some individual). Institutional facts are non-physical facts that, however, are enduring in time in the same way that material facts are.

- d. Institutional facts exist in the context of institutions. Institutions are instances of human activity that are grouped together in correlation to some body or set of valid rules²⁰. Those rules do not exhaust institutional reality but allow for the realisation of new institutional facts and combinations of instances of human activity.
- e. Finally the most interesting task that ITL undertakes is the attempt to offer an account of those rules or norms that put together an institution in whose context institutional facts can exist. There are, roughly, two cases considered by the account: *first* the easy case, when rules are themselves instances of an institution that is already in existence. In that case one can refer to some higher-level rules in virtue of which the lower level (or institution-internal) rules are understood as facts. *Second* the harder case, when the inquiry addresses directly those higher-level rules which exist independently of any institutional foundation. These are the rules that ultimately group together occurrences of physical facts and brute movements into forming various institutions. In tackling the nature of those foundational or framework-rules the ITL strives to deliver an explication of the normativity (i.e. the action-guiding character) of norms as such. Consistent with its programmatic objectives, the ITL explicates the concept of normativity by adopting an *interpretative* stance towards the agents that share the foundational rules; this stance requires that those rules are understood in the terms in which they are intelligible to the relevant agents, a view not very different from Hart’s idea of the internal aspect of rules. This enterprise of understanding seems to unfold in a rather *holistic manner* in that it takes into account the way agent’s behaviour is guided by the relevant rules. Hence, an explication of normativity aspires to establishing a connection between the framework-rules and the concept of human action/agency. A further aspect of this explication is ITL’s requirement that norms are expressible as containing reference to some possible human action (better token of action) or state of affairs. In earlier formulations of the ITL its authors seem to require that in order to understand or group together something as an institution there must exist some norms which are anterior to it, thus evoking some sort of normative central-

20 For the diversity and the different degrees of institutionalisation, vide MacCormick ‘Norms, Institutions and Institutional facts’.

ism in the account of the interconnection between normativity and agency²¹: namely the idea that there might be some ultimate norms that exist before any token of agency or any form of practice. Later formulations correct this impression and render ITL a non-centralist account of normativity that adopts a genuinely pluralist stance towards the sources of normativity²². On this more mature understanding norms and rules, either as instances or as foundation of an institution, are delivered simultaneously with instances of agency or practices. In particular MacCormick advances an understanding of normativity in which practices and further institutions stand in a dialectical relation to the implicit or explicit rules that support them: one is able to depict the appropriate norms that regulate some practice only as participant of that practice. Accordingly, normativity is explicated as the ongoing process of reflecting upon our commitments and aims as well as upon the means for their implementation, always in reference to the tasks and the ‘puzzles’ that our actual interaction with the environment and other agents poses to us.

However, despite of the suggested refinements, the ITL does not seem to be able to deliver an adequate justification of the ‘constitutive’ rules that provide for the foundation of institutions. The reason is that the ITL embraces a strict distinction between fact and value from which follows a non-cognitivist stance in respect to values. This commitment prevents ITL from offering a full-blooded account of the *action-guiding* character of norms (or of the phenomenon of normativity *as such*) when it comes to explaining the level of the ‘constitutive’ norms. In contrast, such an account would have to refer to a series of *objective evaluations* or normative requirements that provide for the link between agency and normativity in a non-reductive way, and in whose light ‘agency’ would feature as an evaluative concept that conditions action-guiding rules. Unless one employs such an evaluative account one’s explication of normativity will have to retreat either to something akin to Hart’s attitudinal account of normativity or to some even more blatant form of reductionism that rests on ‘brute-fact’ accounts.

Insofar as the ITL neglects the evaluative aspect of normativity, it fails to deliver a full-blown anti-reductionist account of legal and broadly social norms. This will be argued *despite* the fact that the ITL dovetails with the semantic account of law’s ontology that was employed so far. In arguing for that claim in the remaining of this chapter, I will gradually

21 Centralism in practical philosophy is the view that the ultimate source of normativity derives from a unique ultimate principle. It is that principle from which all other norms and principles derive their power or validity. Cf. With S. L. Hurley, *Natural Reasons: Personality and Polity* (New York: Oxford University Press, 1992), 10-20.

22 Compare in particular with MacCormick, ‘Norms, Institutions and Institutional Facts’.

introduce the thesis that a semantic account of the ontology of norms is not sufficient in order to block reductionism. Its (very important) role consists in pointing out the fact that legal (normative) discourse ‘rests’ on a domain of ontological categories that are *distinct/independent from and hence non-reducible* to the ontological categories that ‘support’ non-normative discourses. However, there is one more issue to tackle, which lies beyond the power of the semantic account. This is the issue of *the evaluative character of normative entities*. Owing to the suggested semantic explication of ontology this evaluative character can be conceived as the *evaluative content or meaning* of the semantic units, usually sentences, in whose environment normative entities are depicted.

For a sufficient account of the evaluative content of normative sentences, I will argue, a distinct *pragmatic* account is needed. This account will refer to the *pragmatic rules* that necessarily regulate the *validity of our assertive sentences about legal/normative entities*. Additionally I will advance the thesis that those pragmatic rules comprise of two features: *first* they are *a priori* necessary (in a slightly different terminology, ‘transcendental-pragmatic’); *second* they state a minimum amount of substantive standards for agency/action (hence they are action-guiding)²³.

The significance of the proposed combination of a semantic with a pragmatic account of normativity lies in the fact that the pragmatic account is not conceived as a mere supplement to the semantic-ontological one in a manner, say, that one could opt for dispensing with it. Rather the claim is that insofar as the semantic account of ontology makes sense only within an anti-representationalist conception of content, then the pragmatic/evaluative aspect of normative content is *automatically imported* by the *modus* in which anti-representationalism ‘organises’ content-acquisition: i.e. through the *interaction* of content-possessors with the environment and each other. It is on the level of that interaction that certain evaluations (embedded in pragmatic norms for the use of sentences) come into play and constrain normative content. In particular, the kind of interaction that ‘reveals’ those significant evaluations is not any type of interaction with aspects of the environment (for instance with stones or trees) but specifically interaction with other agents. To put it in a – perhaps – oversimplified form, the underlying idea will be that the content (and further knowledge) we acquire in respect to normative entities, not only in the domain of law but also in that of morality, is constrained by certain *pragmatic rules* that are *transcendentally* presupposed by the interaction between agents as part of the process of acquiring content

23 Vide CHs IV and V, *infra*.

about the environment.

In discussing ITL's compatibility with the semantic aspect of an anti-reductionist account of normativity, the following section outlines the reasons for which a semantic analysis of law's ontology should intertwine with a pragmatic account of normative meaning.

Anti-reductionism, ontology and value

In its endeavour to offer an account of normativity, or of the property of norms that renders them action-guiding, the ITL endeavours to adopt an anti-reductionist strategy in respect to social and legal norms: the justification of action/agency requires that our normative vocabulary refers to normative objects *lato sensu*, amongst which count normative properties and facts. Insofar the program of ITL dovetails with the account of the 'objecthood' of norms that was offered until now. In fact it looks that the semantics-exhausts-ontology thesis might be close to an ideal method for accounting for law's ontology, without falling back to some form of occult Platonism, and the acceptance of metaphysically problematic entities whose explication would require a great deal of appeal to intuition.

In the semantics-exhausts-ontology thesis the structure of language exhausts the structure of thought, with the result that thought content can be readily represented through semantic structures. Furthermore, within the context of an anti-representationalist philosophy of content, the semantics-exhausts-ontology thesis has the power to account for the ontological structure of the world through semantics without any further supplements; this follows from the next two ideas when taken conjointly: that, first, if our thoughts and generally our mental states are about the world and not about any mental interface, then the structure of the thought depicts that of the world; and that, second, the structure of the thought is exhausted by the structure of the language.

Although ITL does not use the philosophical vocabulary previously employed it seems almost certain that it would subscribe to anti-representationalism as much as it would subscribe to the semantics-exhausts-ontology thesis. Because if the latter safeguards ITL's concern to avoid Platonism, the idea of anti-representationalism is necessary for evading the bad effects of Idealism and the subsequent scepticism that any dualism between the mind and the environment entails. Indeed, it looks like the whole point of the analysis of how norms enmesh with practices, customs and institutions²⁴ is nothing more than an effort to

24 Vide MacCormick, *ibid.*

secure ITL's firm grounding on (social) reality or on 'how the environment really is'. Thus legal statements are not about things that only exist in our heads but about things that, to a larger or lesser degree, are part of our environment. My thought about a valid norm or a signed contract is about something outside my mind, and clearly it is different from a thought I enjoy about a norm that is not valid or a contract that was never signed (or perhaps a contract whose existence I *hallucinate*)! Hence non-dualism and anti-representationalism are necessary prerequisites for the semantic explication of ontology: the privileged role of language or semantics in ontology can only be established under the supposition that the structure of the mind is identical with the structure of the world²⁵.

A strong case for the plausibility of this view is to be found in some recent, powerful accounts of knowledge²⁶. In those accounts the *factive state* of knowledge is analysed as constituting a state of mind; this analysis contravenes the standard view that knowing something derives from the conjunction of some mental or internal element (belief) plus the appropriate external, non-mental component (truth)²⁷. On the non-standard view one knows *p* if and only if one is in a mental state *S*; hence *S* is necessary and sufficient for knowing *p*. In short, knowing on the non-standard view is merely a state of mind. Now, since knowing is a factive state, a state about some aspect of the environment, the only way to sustain that knowledge is a state of mind is to fully rebut the mind-world dualism and the associated idea of mental representations or intermediaries. Only if the mind is located within the environment can factive states be understood as being mental states.

The discussion in Ch II showed that when placed in the environment of anti-representationalism the *semantics-exhausts-thought* thesis amounts to the *semantics-exhausts-ontology thesis*. From that derives an account of ontology, of what there is, over a semantic account of the structure of propositions and the inferential relations between them. This method comes across as being particularly appealing when the objects of cognition are

25 As was maintained in CHs II and III.

26 Vide instead of others T. Williamson, *Knowledge and its Limits* (Oxford: Clarendon Press, 2000), Ch. I. Also J. McDowell 'Knowledge and the Internal' in idem, *Meaning, Knowledge and Reality* (Cambridge Mass: Harvard University Press, 1998), 395-413.

27 This is the traditional, so-called, *hybrid account* of knowledge according to which knowledge equals true belief plus some other internal to the mind components. This understanding of knowledge was first put in serious question by Gettier, who stated counterexamples on which knowledge does not obtain even if its alleged compound parts do (*locus classicus* for that argument is E. Gettier 'Is Justified True Belief Knowledge?', *Analysis*, 23 (1963), 121-123. Since that article the battle for an account of knowledge has been fought along the lines of either offering refined accounts of the internal components of knowledge that would meet the Gettier challenge, or by offering new counterexamples that would anew defeat the refined accounts of knowledge.

abstract normative objects, facts, and other entities in the spirit of the ITL. To that extent the ITL can be readily reconciled with the basic tenets of a semantic account of ontology. However, as I pointed out earlier, a semantic account of normative entities, in the context of an anti-representationalist theory of content, will be required to take into account the evaluative groundwork that underlies the interaction between agents. This requirement rests *prima facie* on the following two grounds.

The *first* is the issue of meaning. Any semantic explication of ontology, will require some account of the meaning of the words and sentences that compose the structure of thought: if thought-content, which is about the environment, is exhausted by the semantic structures of language, a basic condition of understanding what it is about is to understand the meanings of the symbols. Trivially the two basic options for an account of meaning are: *a truth-conditional theory of meaning*; and *a meaning-as-use-theory of meaning*. In the sections to follow, I will allude to a series of reasons for which the second option is more attractive. However the main reason for opting for the use-theory has to do with the way one chooses to understand the second interlocking issue.

The *second* issue relates to the way the contents of thought are taken to depict the environment. Let us call this the *operational part* of the semantics-exhausts-ontology thesis. The operational part deals roughly with the question of how the mind meshes with the world. Of course, the question is raised on a *normative* level; what is required is an account of the principles that guide the structuring of thought towards reflecting the structure of the environment. Already in earlier chapters a version of the same question guided the analysis towards locating the syntactic-logical principles that govern the relations between ontological categories on the level of the basic semantic unit of the sentence/proposition²⁸. The present task is slightly different, yet it should be understood as being complementary to that earlier one. What is inquired about presently are the normative principles or the normative patterns that *underlie our interaction with the environment*, where this interaction is taken to be constitutive to the ‘mechanism’ of placing thought (the mind) in the world. To that extent those normative patterns should be understood as unfolding on a pragmatic level, as opposed to the logical-syntactic level that was referred to earlier.

With this move the basic assumption has been cast: namely that non-dualism can be rejected only if we perceive *knowers* (and broadly content-possessors) as *agents* who interact with the environment (and other agents). In short, the suggestion is that the route to-

28 Compare with CHs II and III.

wards forming thoughts and acquiring knowledge and other factive states necessarily passes through the innumerable ways of interacting with the environment or the infinite forms and shapes that our agency acquires. Put in a sketchy manner, the mind reacts to the way the physical environment impedes or enables our movements²⁹. When I form a thought about a cup being on the table, I somehow have to take account of the way the cup interferes with my agency. All the information that my senses report about the cup is somehow organised against the normative matrix of a proposition; this will amount to grasping the cup as being an object with certain properties. The same picture will be roughly adequate in grasping also abstract objects or facts like normative objects and norms. When I run into a queue in front of the counter, I grasp the rule that regulates the behaviour of those who stand in the queue³⁰. Even in that case the environment somehow impedes my agency or, at least, delineates the space within which my agency may ‘expand’.

Now every portion of new knowledge concerning action-guiding norms (like the rule of queuing) will add up to the network of action-guiding norms that regulate one’s agency. To that extent, past and new norms will form a network of action-guiding patterns that delineate agency and hence demarcate future content-formation. However beyond the level of all contingent³¹ past, present and future normative patterns for action or agency – whose knowledge we acquire by immersing into everyday situations – there seems to be a non-contingent normative *meta-level* which we need to presuppose in order to make sense of the *meanings* of the semantic symbols and units (words and sentences) that individuate thought-content (both normative and non-normative)³². Thus a sentence which individuates a thought about a cup can be asserted along the same rule that regulates the assertion of a

29 Compare with Luntley, *Contemporary Philosophy of Thought*, 342-346.

30 The example comes from MacCormick’s account of queuing, in ‘Norms, Institutions’, 303-309.

31 Though the use of the adjective ‘contingent’ might be misleading I will allude to it for the following reasons; what I want to emphasise here is that the richness of normative abstract entities is deeply embedded in the every-day interaction of the agents with the environment, and could never fully be anticipated by pure theoretical reflection. To that respect the proper way to account for norms or normative system is by using non-centralist theories that avoid deducing norms from an ultimate principle by pure reflection. In this context norms can be understood as being ‘contingent’ in the sense that we arrive at their knowledge only by entangling ourselves in specific action-guiding contexts, i.e. practices, institutions and so on. Having said that, no norm or other normative entity is contingent in the sense that it is created in an *unprincipled* way as for instance positivism takes a judge to stipulate a rule in a hard case. It is rather the case that in being able to appreciate or come to know a new norm, we rely on a deeper-level normativity: this normativity is put together by some norms or principles that offer the possibility to grasp *normativity as such*. Those deeper norms offer the metaphysical possibility for normative knowledge. Further to the degree that this kind of knowledge is mediated by language, the deeper-level norms can be reconstructed as pragmatic norms that regulate meaning and understanding (Ch IV, *infra*, and Ch V).

sentence that individuates a thought about a norm³³.

The norms that put together the normative meta-level referred to, can be understood as pragmatic norms that regulate the *validity* of thought-formation via sentence formation. Validity in this context can be conceived in relation to a series of pragmatic or interpersonal claims that speakers raise by bringing about different *illocutions* (questions, assertions and so on). The pragmatic rules that contain those claims transcend specific speech-contexts and provide for general guidelines for the use of words and sentences³⁴. Against the background of those rules it is possible to account for the meanings of words and sentences along the lines of some version of a use theory of meaning³⁵. But, as already suggested, in the semantics-exhausts-ontology thesis thought-content is individuated according to the meanings of the relevant semantic units that individuate content. Hence the normative-pragmatic patterns that regulate the validity of illocutions and derivatively the meanings of words and sentences can readily be taken to regulate content formation.

An understanding of meaning and content as being regulated or constrained by a series of pragmatic normative presuppositions only makes sense in an action-mediated context where content-formation is explicated as being generated through agents' interaction with the environment: in this context semantic units individuate content according to their meanings; those meanings are fixed by the pragmatic norms which govern the use of the semantic units. Clearly, the concept of the pragmatic norms can only be accounted for in connection with the agents' interaction with the environment and each other. Those norms are pragmatic to the extent that they emerge from the constellation between speakers/agents in the every-day process (or practice) of tackling the environment. Their validity cannot be explained in connection to any other superior as it were norm but rests on the observation that their non-following or ignoring would involve some sort of contradiction (transcend-

32 This is going to be argued in a detailed way in CHs V and VI.

33 Having said that, the present essay is particularly interested in the pragmatic presuppositions of normative content. As CHs IV and V will argue those aren't entirely identical to the presuppositions of non-normative content.

34 The idea is common to many philosophers in both the analytic and the continental tradition; for instance in H. P. Grice, *Studies in the Way of Words* (Cambridge Mass: Harvard 1989); Austin, *How to do Things with Words* 2nd edn (Oxford: Clarendon Press, 1975). The pragmatic level of meaning and communication has especially been developed in the German-speaking contemporary philosophy; vide the pioneering work of K.-O. Apel, *Transformation der Philosophie vol 2: das Apriori der Kommunikationsgemeinschaft*, 4th edn (Frankfurt am Main: Suhrkamp, 1988); also idem, *From a Transcendental-Semiotic Point of View* (Manchester and New York: Manchester University Press, 1998); vide also J. Habermas, *Moralbewußtsein und Kommunikatives Handeln*, 5th edn (Frankfurt am Main: Suhrkamp, 1992) and idem, *Erläuterungen zur Diskursethik*, 2nd edn (Frankfurt am Main: Suhrkamp, 1992).

dental validity)³⁶.

Connectedly the transcendental-pragmatic norms that regulate meaning and content are primarily norms that are substantiated *in relation to action*. Insofar they are *foremost norms for the regulation of agency and derivatively norms for the regulation of meaning and content*³⁷. Furthermore, in virtue of their transcendental validity, the pragmatic norms function as something like the normative bedrock upon which agency rests. Hence any values that those norms bring into expression transcend specific action contexts and, instead, are located on the level of the bedrock that supports agency *tout court*. As a result the network of all action guiding norms that come to light in every-day contexts of interaction with the environment and other agents needs to be in accord with the transcendental pragmatic norms that support agency. Connectedly the pragmatic bedrock of action contains standards for the validity of all action-guiding norms past, present and future, including legal norms.

Conclusions and further objectives

In a more ITL-relevant terminology, the correct task of a semantic account of norms' ontology is to show that beyond the specific institutions in whose framework an account of normative facts can be given, there is a need to account for a more far-reaching 'institution', something like a *practice of communication*³⁸. The reason for the admittance of such a 'super-institution' is the need to account for the 'framework' or 'constitutive' rules of particular institutions: it is the idea that when one comes to grasp the rules of a particular practice or other action-guiding context, one seems to be already participating in a *more general practice* that enables one to adopt the internal point of view, to grasp in other words the normative (action-guiding) meaning of the framework rules that constitute particular institutions *prior to one's actual participation* in them.

As a result, the proposed account adopts an expansive conception of 'institution' in general and the institution of law in particular, as opposed to ITL's restrictive understanding. In explicating law the ITL seems to postulate the existence of a space that is more or less strictly demarcated from other practices; in that space law's meaning is specifically legal and legal agency is a specific domain of agency that abides by legal rules predominantly. Conversely, on the expansive conception of 'institution', law is the social practice in

35 Vide this chapter, sec. 5, *infra*.

36 Vide Ch. V.

37 This claim will be refined in CHs V and VI, *infra*.

38 Communication is here understood as comprising elements of agency with elements of cognitive

which legal content/meaning-as-use is generated. Furthermore, insofar as legal meaning is normative, legal practice will be guided by the same pragmatic-normative presuppositions that regulate general normative meaning. Connectedly any restrictions imposed upon legal discourses, giving thus the impression that the legal system is a closed system that obeys an internal rationality, are at the end of the day restrictions that can make sense only against the background of the norms that support the overall practice of communication.

In all the discussion of ITL suggests that an anti-reductionist account of normativity comprises two levels of analysis: a *semantic-ontological* and a *pragmatic-normative* (normative in the sense of action-guiding). On the first level, the semantic-ontological, the inferential structures of language offer us the ability to constitute rules as normative facts (or abstract objects *lato sensu*). For that an anti-representationalist theory of thought is presupposed. The second level, the pragmatic-normative, endeavours to offer an account of the action-guiding content/meaning of legal sentences by making reference to a non-reductive account of agency. For that an account of the evaluative bedrock of agency is required. It was further suggested that in the context of anti-representationalism this account can be generated by focusing on the analysis of the pragmatic presuppositions that regulate the validity (meaning) of normative sentences.

The remaining of this chapter will offer a more detailed inquiry into the interconnections between the two levels and, thus, prepare the ground for an analysis of the transcendental-pragmatic conditions of normativity.

ONTOLOGY AND AGENCY

Whereas the semantic account succeeded in providing for an adequate account of the ontological puzzles that pertain to norms' nature, there is a further important issue that remains still untouched. This relates to the observation that the semantic story might have fallen short of accounting for one fundamental intuition concerning norms, namely their evaluative character. As early as in the discussion of Hart's understanding of the concept of law³⁹, it was made clear that the (ontological) irreducibility of norms is somehow connected with their evaluative character. Indeed, Hart claimed that the basic feature of the internal aspect of any rule is its understanding as incorporating an evaluation (revealed through the critical reflective attitude). The shortcoming of the semantic account becomes rather acute upon

activity, in the spirit of the previous discussion.

39 Vide Ch I, *supra*.

reflection on the fact that the evaluative aspect was taken to be the specific difference of rules from other commands or imperatives. Thus, unless the ontological account is expanded or supplemented towards explaining rules' evaluative aspect, it will be incomplete.

One could argue that the semantic account has generated a description of the ontology of norms in which the evaluative element was indeed accounted for by the 'ought' that every norm contains in virtue of its being a modal meta-fact. This is not besides the point; but it is not a satisfactory answer either. The semantic account has indeed captured normative sentences as signifying 'oughts' and their counterparts - i.e. norms - as being abstract objects that 'crystallise' instances or tokens of the modality of 'ought', to allow a somewhat figurative expression. In doing so, however, the semantic story did not fully explain what this modality or its meaning consists in. In other words, it didn't provide an explanation for what it is to understand a rule as expressing a normative meaning and, hence, as incorporating an evaluative aspect. Until this explanation is made available the ontological autonomy of norms will not stand on a firm ground. I will suggest that such an account is possible within the context of the *semantic anti-representationalism* that has presented in Ch II. This will be argued on the basis of two interlocking issues:

The *first issue* relates to the claim that semantic anti-representationalism optimally amounts to an account of human agency as constituting our conceptual boundary when we attempt to enumerate 'the things that exist' (ontology). A lot for the soundness of that claim rests upon the way semantic anti-representationalism already takes semantic units, like words and sentences, to individuate content, namely according to the *aspect or portion* of the world that they reveal to us (as content-possessors)⁴⁰. Now the aspect of the world that sentences or words reveal to us turns on the way we grasp or understand their meaning (or 'sense' in a more Fregean vocabulary⁴¹). So far, an account of ontology will mesh with an account of the way we understand meanings. In addition to that, I will take, in a somewhat axiomatic way at this stage, an account of meaning to unfold along the lines of a 'meaning-as-use' theory⁴². Such a theory aims to make explicit the normative guidelines (rules) upon

40 Vide the discussion in CHs II and III, *supra*.

41 For a clarification of the Fregean termini vide CH III, *supra* (cf. in particular with the text corresponding to fn 22).

42 I hope that the arbitrariness of this choice will be counterweighted by two reasons: first by the fact that some form of the 'use-theory' of meaning seems to be the standard view amongst contemporary philosophers of language; second by the fact that the 'use-theory' ideally dovetails with intentional realism's claim that the semantic-propositional structure of our intentional states is necessary in accounting for human agency: in other words, as intentional realism accounts for the normative constraints of action, the use theory of meaning accounts for the normative constraints (rules) to which

which the employment of our words and sentences rests to the effect that it is valid. Those rules refer to the way content-possessors *employ* or use linguistic structures in order to acquire content about the environment. The act of employment of linguistic units unfolds as an act of *interaction* of content possessors as agents with the environment in the process of content acquisition. To that degree, the rules for the validity of sentences have a pragmatic character and can be expanded into addressing *agency* altogether (CHs V and VI). Hence an analysis of the pragmatic norms that govern meaning-as-use will simultaneously be an analysis of the norms that govern action. As a result this move will elucidate the claim that ontology is constrained by agency.

The *second issue* broadens the scope of a theory of meaning as use by focusing specifically on the meaning of normative (amongst them also legal) expressions and sentences: the claim here is that since an account of the normative requirements of meaning amounts to an account of agency, the specific account of normative meaning, as action-guiding meaning *par excellence*, will have a special impact upon the normative constraints of agency. More specifically: the meaning of normative propositions, or better, the normative-pragmatic requirements for understanding them as signifying ‘oughts’⁴³, generates a very concrete account of human agency; As a result the content of ‘agency’ is conditioned upon, or even put together, by the instances of ‘ought’, spelled out by all normative propositions, at least to the degree that agency embraces norm-regulated conduct. What this line of argument amounts to is the thesis that the concept of agency that is evoked by semantic anti-representationalism cannot be different from the one generated by the account of the meaning of normative propositions. In fact the account of agency will be constituted on the basis of an account of the meanings of normative propositions and their counterparts (norms).

To substantiate these claims I will next embark on a more detailed discussion of a version of the theory of meaning as use which will provide a minimum theoretical background for the discussion of the normative groundwork that supports meaning and understanding. After that I will briefly discuss the impact of an analysis of normative meaning on the account of agency.

meaning-as-use (or action) abides.

43 What is implied here is that a proposition will, usually, express an ‘ought’ and, hence, depict a valid norm only if there is another norm which empowers it to do so. Later it will be argued that for any ‘ought’ to be valid, one will need to presuppose an ultimate irreducible substantive norm, something like a principle which guarantees the autonomy of agents.

Under the rubric ‘use theory of meaning’ one can group together a plethora of theories which, roughly, attempt to explain the meaning of linguistic expressions through their use or function in language as a medium of communication. The idea was initially put forward by Wittgenstein during the later phase of his work and since then it has had an increasing influence on philosophers of language⁴⁴. Disregarding the differences in detail and elaboration the various theories share a common core: the thesis that use exhausts meaning (call it the use-exhausts-meaning thesis). On a first glance the content of that thesis is that in accounting for the meaning of words and sentences one has to attend to the ways those linguistic units are actually employed or used within a language. In doing so one comes to grasp the rules that govern that use. Those use-rules constitute the meaning of the relevant words and sentences. To that degree meaning is a concept that can be explained within language (it is language-immanent).

Consequently in our effort to understand meaning we have to focus on the way words and, particularly, sentences are employed within language with the aim to make explicit the underlying rules that govern that employment. Those rules constitute something like a normative bedrock which is the last instance of explanation in respect to meaning and understanding. It is, hence, maintained that understanding those rules does not require reference to any additional rules or other extra-linguistic entities. Rather, the idea in respect to the rules of use is that intentional beings who are able to apply rules have a spontaneous normative response about the right way to apply a rule in a given case⁴⁵.

Asserting a Sentence

The elementary level of sentence use which the analysis of meaning takes as its starting point is the assertion of a sentence⁴⁶. The rule which specifies the conditions for correctly asserting a sentence S in language L takes the form⁴⁷:

44 For a brief albeit comprehensive survey, vide John Skorupski, ‘Meaning, Use, Verification’, in B. Hale and C. Wright (eds.), *A Companion to the Philosophy of Language* (Oxford: Blackwell, 1999) 29-59. For a contemporary version of a use theory of meaning see P. Horwich, *Meaning* (Oxford: Oxford University Press, 1998), Ch 3.

45 Vide Skorupski, *ibid.* 31; also Ch. VI, *infra*, where I discuss the Wittgensteinian notion of the ‘bed-rock’ of a language.

46 The discussion will stay on the level of sentences since the rules that govern the use of words are determined in connection with the way a word contributes to the assertion conditions of a sentence; see also Skorupski, *ibid.* 32.

47 In the formulations of the rules for assertion I follow roughly Skorupski, *ibid.* 32-40. Later in the

(Rule of Assertion): S is correctly used in order to make an assertion in L if and only if one is justified in believing, of the proposition that is expressed by the use of S, that it is true.

Thus to correctly assert a sentence means that one is justified in believing that the sentence is true, in the broadest sense of the word 'true'. Accordingly, assertion and truth are connected within a rule that specifies the conditions for the correct use of affirmative sentences. As a result the rule of assertion provides for a notion of correctness that relies on some form of epistemic justification⁴⁸: one undertakes a correct use of a sentence as long as one is justified in believing that the corresponding proposition is true. Put in this way, however, the notion of correctness (and the relevant rule of assertion) appears to refer to propositions as some entities of some extra-linguistic nature, different from that of sentences. On a first look this creates a difficulty: taken conjointly, the premises 'the meaning of a sentence is exhausted by its correct use (or the rule that governs that use)' and 'the correct use of a sentence relates to the truth of the corresponding proposition', yield the conclusion that the meaning of a sentence turns on the truth of a proposition. Were one to conceive propositions as being extra-linguistic entities, the project of the use-theory of meaning, i.e. to explain meaning in a language-immanent way, collapses.

Therefore, in order to avoid this conclusion, a use theory of meaning proceeds to explicate the notion of the proposition in a language immanent way. In other words, propositions as corresponding to sentences (and concepts as corresponding to concept-words), have to be associated themselves with the way we use language. But this is not something novel or contradictory for a use theory of meaning. In fact the whole program of explaining meaning and understanding through use, rests on the assumption that there are no entities external to language that are meaning-intrinsic or self-interpreting and, thus, can account for the meaning of linguistic signs⁴⁹. The only 'source' of meaning is the use of an expression or a sentence according to some normative standards. Understood that way, to talk of concepts and propositions is simply to talk indirectly of the use of expressions and sentences within particular languages. To grasp a proposition or a concept is to normatively respond to

thesis (CHs V and VI), I will discuss the pragmatic aspect of the rules of use for a language. That aspect consists in the raising of specific claims on behalf of those who use sentences and words. Those pragmatic rules support the communicative dimension of language, as it has been suggested in the work of K.-O. Apel, J. Habermas and R. Alexy.

48 Vide Scorupski, *ibid.* 32-33.

49 This is a characteristically Wittgensteinian idea and is in detail discussed in Ch. VI.

a rule according to which some sentence or expression is employed in a language. Along these lines, talking about propositions and concepts is nothing more than talking about language-understanding in an abstract way, i.e. without specifying the particular language. Which is to say that concepts and propositions have no explanatory role in an account of meaning as use.

Specified in that way, the use-theory of meaning is, to talk with Michael Dummett⁵⁰, a full-blooded theory of meaning which does not rely on extra-linguistic concepts or propositions in order to account for meaning, but proceeds to explain what it is to possess a concept or grasp a proposition as part of the account of meaning. It is for that reason that the use-theory incorporates an epistemic claim: the priority of language in the explanation of meaning yields an account of what it is to be justified in believing that a sentence/proposition is true. This account is epistemic in that it contains an analysis of what it is to know that a sentence/proposition is true: in a full-blooded theory of meaning-as-use, this consists in a 'practical ability to tell when it is right to utter [a sentence] assertorically: to recognise information states as warranting or not warranting that kind of utterance of the sentence'⁵¹.

Meaning and truth

The satisfaction of the epistemic claim of the use theory of meaning requires some account of the truth conditions of a sentence-as-proposition. Such an account can be given by a semantic theory of truth as the one discussed in the first part of this chapter. According to a semantic theory of truth the truth conditions of a sentence will be given by the conditional:

(truth-conditional formula): Sentence S is true in language L if and only if it is the case that proposition P.

This formula discharges the epistemic claim raised by the rule of assertion: S is correctly used to make an assertion if and only if one is justified in believing that the sentence is true; and the truth-conditional formula provides the truth-conditions for S in L. Stated in those terms the truth-conditional explication of meaning needn't be incompatible with a language-immanent explication of propositions and concepts. However, the claim raised by a 'full-

50 Vide Dummett, *The Seas of Language* (Oxford: Clarendon Press, 1996), and the discussion in Skorupski, *ibid.* 38 n..

51 Skorupski, *ibid.* 39.

blooded' semantic theory poses some further constraints upon the truth-conditional explication of meaning. Those constraints refer, as mentioned before, to the way one is allowed to understand the relation between propositions and sentences. In particular, the concern arises in connection with the way one is going to demarcate the epistemic issue of 'grasping a proposition' or 'possessing a concept'. There are at least two ways to conduct such an enterprise:

The first way is to explicate the epistemic issue as exceeding the boundaries of a theory of meaning. To abide by that option entails that one distinguishes, more or less, between two phases in one's account of the meaning of a sentence *S*. Accordingly, to know the assertion of *S* in *L* is, first, to know its truth-condition and, second, know the epistemology which links with that truth-condition⁵². While the first issue belongs to the subject matter of a theory of meaning, the latter doesn't. On this understanding what the theory of meaning, and its truth-conditional part, account for is merely the 'things' of which linguistic expressions are true of (namely the propositions of which sentences are true). However, the theory of meaning seems to remain silent in respect to the epistemic question 'how does one come to know the truth-conditions of a proposition'. This question will have to be answered by an epistemological account that goes beyond the boundaries of any theory of meaning and will account for extra or pre-linguistic entities or connections⁵³.

I take it to be pretty obvious that such a solution is not what a full-blooded use theory of meaning aims for. Therefore I will consider the second way of tackling the epistemic issue of 'grasping a proposition' to offer a more satisfactory solution. The second way holds, roughly, that the theory of meaning has to go beyond a truth-conditional part that '...merely stat[es] what expressions of the language are true of and deriving from that truth-conditions for sentences of the language'⁵⁴. In fact it has to explain what it is to know the truth-conditions of a sentence. But in doing so it merely evokes the assertion conditions of a sentence. This is perfectly consistent with the point of a full-blooded theory of meaning; namely, that grasping truth-conditions is never over and above mastering assertion conditions. Thus, knowing the truth-conditions of a sentence consists in a practical ability to 'tell when it is right to utter it assertorically: to recognise information states as warranting or not warranting that kind of utterance of the sentence'⁵⁵.

52 Skorupski, *ibid.* 37.

53 This is, roughly, the solution that Skorupski suggests, *ibid.* 48-54.

54 Skorupski, *ibid.* 38.

55 *Ibid.* 39.

Arguably, this furnishing of truth-conditions suggests a verificatonist understanding of the assertion conditions and, derivatively, of the concept of meaning⁵⁶. Having said that, verificationism in respect to meaning is to be distinguished from verificationism in respect to truth. The first version says that understanding a sentence consists in grasping what information states would verify it irrespective of those states' actual existence or availability. (Put in slightly different terms, it is the idea that a sentence is meaningful if and only if one is able to conceive or 'simulate' what sort of evidence would be adequate for asserting a sentence). In contrast, verificationism in relation to truth holds that truth is verifiability. A sentence is true if and only if there actually is evidence warranting its assertion. Leaving the second conception aside, some version of verificationism about meaning could be made compatible with a flexible pragmatic account of meaning as use. For that to work one needs to evoke a looser version of verificationism about meaning which, roughly, holds that a sentence is verifiable if one can describe, at least in principle, what it would be like to encounter in experience the state of affairs which makes a sentence true.

This version of verificationism escapes the narrow or *stricto sensu* verificationism about truth that was endemic in the thought of Vienna Circle and the work of the early Wittgenstein. Verificationism *stricto sensu* holds that the meaning of a sentence is determined by the actual availability of a state of affairs for which the sentence functions as a picture or mirror. For that an ontology is presupposed which postulates reality as consisting of a totality of states of affairs⁵⁷. In this context understanding a sentence implies that one is able to experience in a direct way whether the relevant state of affairs obtains. In contrast to this idea a more flexible version of verificationism about meaning can be taken to share insights with the later work of Wittgenstein. On this approach the meaning of a sentence is related with the methods of verification rather than some picturable state of affairs that would verify it. Linking the concept of meaning to the method of verification bestows meaning with a significant amount of flexibility: meaning is made dependent upon the method of verification; further, since there are many different methods to verify a sentence, meaning becomes perspectival or context-related. This yields a pluralistic understanding of the assertion-conditions of a sentence which eventually leads to a rather *liberalised* conception of meaning⁵⁸. The assertion conditions as consisting in the method of verification

56 For a detailed discussion of the topics in this and the next paragraph, vide Skorupski, *ibid.* 40-45.

57 For the affinity with the ontology of Wittgenstein's *Tractatus Logico-Philosophicus*, see Skorupski, *ibid.* 40-45.

58 Cf. with Luntley, *Contemporary Philosophy of Thought*, Ch 12.

eventually are taken to incorporate the consequences of an assertion for practice as well as the operations which licence it. This broadening of the concept of meaning towards incorporating practical consequences is particularly acute in the late work of Wittgenstein. There, understanding an assertion is more than to be told when one is licensed to make that assertion; one needs to know what consequences flow from that assertion for action.

In this liberalised conception of meaning action becomes constitutive for the determination of meanings. Understanding a word or a sentence is knowing what can be done with it in communication and action. Connectedly the liberalised conception of meaning transcends verificationism (as a method for establishing assertion conditions) and is recast as a practical concept (as emanating from the *consequences* that the use of words and sentences entail in our everyday practices of communication). *Meaning as a practical concept* dovetails with a picture of intentionality that is radically externalist or informed by the environment⁵⁹. In this picture, thought is directed to the environment not via mental representations but through the way action/agency is *impeded or enabled* by the environment: my thought concerning the book being on the table, commits me to holding true claims about how my movement will be impeded by that particular book, or how the movement of other objects will be impeded or enabled by it⁶⁰. On this approach intentional content is generated according to the (normative) patterns of action. To put it differently, the normativity of content does not flow from the environment as such, as there are hardly any physical things with intrinsic normative properties. In contrast normativity comes from another direction: *from the patterns of our actions*, where actions are causal encounters with the physical environment and other agents. Thus, in a way, the environment is mapped by our thought according to the way it 'impedes' or 'interferes' with the network of our actions.

The dimension of the (inter)action of agents with the environment invests meaning with an evaluative aspect: as meaning is generated along the way action 'meets' the environment, the various instances of this 'meeting' are interpreted in the light of the evaluations that underlie action. In this sense it is action that provides for the evaluative character of meaning considering that the environment, as such, is valueless. In the light of the values that underlie action the *consequences* of understanding a sentence in one rather than another way become significant for the determination of meaning. To that extent, meaning becomes dependent upon the consequences that understanding, in the light of action, entails. For

59 Vide supra, Ch. II; also for a concise discussion Luntley, *ibid.* Ch. 12 (342-346).

60 For this idea see Luntley, *ibid.*, 345.

instance the consequences that the act of asserting entails for action points to the rule that one should be truthful when asserting something (imagine asserting untruthfully to a blind person that the staircase he is about to descend has 10 instead of 12 stairs – just to use an example where the consequences for action are fairly clear!). Hence consequences for action point to the normative constraints of meaning and demarcate meaning as a normative concept throughout.

Those constraints appear to be twofold, according to the normative reasons in whose light they are instantiated: constraints that emanate from the way the environment is (constraints from natural or physical normativity); and constraints that emanate from interaction with other agents (constraints from practical reason or morality). The constraints from practical reason can be distinguished in two further groups: those that flow from the norms of morality *stricto sensu* (ethics, law and other social normative systems); and those that flow from the pragmatic norms that render practical norms intelligible. The latter, rules of morality *lato sensu*, contain basically the necessary validity rules for the formation of the sentences that contain the norms and the expressions of the *stricto-sensu* morality⁶¹. Taken together, the norms of morality *stricto sensu* and the morality *lato sensu* constitute agency as an evaluative concept by demarcating the domain of what is ‘allowed’ and what is ‘forbidden’, what is a right and what is a wrong action. Moreover understanding the meaning of the practical sentences that contain the rules of morality *stricto sensu* already commits one to an explication of the concept of agency as resting upon the pragmatic rules that enable practical meaning, or the rules of morality *lato sensu*. That being the case, the pragmatic rules that make practical sentences intelligible can be taken to demarcate the territory of human agency as a whole, to the extent that they are antecedent to all practical meaning.

NORMATIVE MEANING AND AGENCY

Notably the rejection of mental representations and of the idea of mind-world dualism leads to an account of content in which agency plays a central role. Agency becomes constitutive to the formation of intentional content, owing to its ability to ‘place’ the mind in the world. What we understand or even know as being or being not the case is grounded on the way we interact with the environment. Conversely, the criterion for ascribing intentional states to others is whether those states are suitable in offering a rational account of the agents’ behaviour. In both cases action or agency seems to be the standard against which correctness

of content is measured. To that extent, in the environment of an anti-representationalist (and non-dualist) conception of the mind-world relations, action and agency develop a normative impact upon intentional content. Content is informed by the context of particular instances of agency (practices).

One of the implications of recasting intentional content as being contextually determined is that content becomes dependent upon the perspective or the angle of the world that is revealed within particular actions, instances of agency or practices. Connectedly the semantic structures of thought are not self-interpreting structures that state, as it were, eternal truths but stand for bits of the environment according to the way they convey meanings. Further, they convey meanings according to the way meaning is shaped within practice (or the way we employ/use words and sentences upon interacting with the environment⁶²). But then the practice that determines thought-content and linguistic meaning is one and the same, at least under the supposition that thought is exhausted in language: semantic units are capable of individuating content according to the way they acquire meaning, according to the way they are used upon agents' interaction with the environment. This offers the possibility of re-stating the semantics-exhausts-ontology thesis as the meaning-exhausts-ontology thesis.

On the understanding just sketched, meaning and content seem to be inconceivable outside the context of agency, seem to somehow presuppose agency. Connectedly, agency appears to pose a series of requirements on content and meaning: content and meaning need to be able to account for the rationality of agency. It was earlier argued that both anti-representationalism and the idea of logical grammar rest on the requirement of intentional realism, or the tenet that rational human behaviour can be explained adequately only through the appreciation of the existence of contentful intentional states. According to this suggestion, the restrictions that anti-representationalism and grammar pose on truth and reference are supplemented by a third (perhaps more fundamental) constraint: the ability of content to rationally account for human behaviour. This can be rephrased as the requirement that true sentences and referring terms contain the appropriate rational significance in the sense that they are capable of bringing about the appropriate impact on human action. Along these lines, a sentence is true and a term refers according to the way they have a rational

61 For a detailed discussion of those topics, vide *infra*, CHs V and VI.

62 It is clear that in a non-dualist environment where thought is more or less exhausted by language, an account of thought-content is already equivalent to some account of the use of semantic units within a specific context. To that degree it is almost impossible to keep a semantic account of content

impact on the behaviour of an agent. Insofar their impact becomes dependent upon their meaning (or the Fregean 'sense'⁶³). Consequently, the concept of meaning can be taken as bringing into expression the idea of grammar as the individuation of world-content which further stands under the restriction of rational impact upon agency: in the semantics-exhausts-ontology thesis, grammar is the means that serves towards individuating content. Contentful intentional states are individuated via the structure of grammar in sentences, singular terms, and predicates. Individuated in this way, contentful states are linguistic structures. Now, these structures explain our behaviour according to what they mean. In other words, their rational impact upon our behaviour is given by their meaning. The issue, namely, of the rational impact of grammar upon our behaviour becomes tantamount to the question about the impact our sentences, terms, etc. have upon our agency, through their meaning. Hence meaning is the structure of thought that meets the requirement of rational impact upon behaviour.

The rough equation of grammar with meaning, implies that meaning (like grammar) exhausts ontology. In other words, it implies that it is not possible to give an account of the world independently of meanings (as incorporating intentional states) and vice-versa. The implications of this tenet are rather notable: by qualifying grammar as being composed put together by meanings, our account of ontology is subjected to a constraint of rationality. This rationality is a rationality under the light of human agency. Hence, ontology will require, via an account of meaning, an account of human action/agency. This account will characterise the way the mind meshes with the world, in arguing that an account of what exists need to be incorporated into an account of what rationally exists, where the content of the rationality proviso will be given through an account of human agency. To that degree, any account of the referents of singular terms and predicates as well as the conditions under which sentences are true, will have to be backed by the account of human agency.

However, this picture calls for clarification of the issue of the 'rationality' of action/agency. Apparently any attempt to refer to the requirements that action poses on content, meaning and finally ontology, will depend upon the way one understands rationality as a property of agency/action. One way, one that I am not going to pursue further, would be to try to give an account of rationality as an agency-immanent property, as a feature (probably irreducible) of agency out of which flow the normativity of content and meaning. A more

perfectly immune from a pragmatic account of the way meaning is acquired.

63 For the content of the Fregean concept 'sense' cf. with Ch. III.

plausible alternative is to connect rationality with the normative patterns of action, which are responsible for fixing content (and meaning). In a way this second method takes the concept of rationality to follow from whatever normative patterns govern action. The idea is simple: the more formal notion of rationality makes sense only as being consequent to the more substantive notion of the normative pattern. The latter should be conceived as consisting in some rules or norms that are action-guiding. In specifying those norms a simple solution is to identify them with whatever action-guiding maxims and rules belong to morality *lato sensu*. The simplicity of the solution is rather convenient: it dovetails with the earlier suggestion that (inter)action with other agents is 'impeded' or better informed by the norms of practical reason and morality. Since those norms are the most competent entities for regulating any form of action, why should some domain of action (the one responsible for the constitution of content and meaning) be exempted from them?

Be that as it may, the simplicity of the answer might suggest an unusual complication: until now ontology has been grounded on the way content is formed according to semantic structures and meanings. Furthermore, the discussion has established that meaning is exhausted in the way we use words and sentences. And finally the use of words and sentences has been identified with the way we interact with the environment, i.e. with the way content is produced. All that appears to point to some sort of circularity: if norms are ontologically accounted for by meanings and if the latter are merely imaginable within the context of practices and instances of agency, how is it possible to conceive normativity of action as resting on some norms that are antecedent to agency?

Let me pause for a moment and reconsider the picture I have been canvassing in the last few paragraphs: in it, the environment is mapped by the meanings of semantic symbols according to the way agents interact with the environment. Thus, agency maps the environment according to the way the latter interferes with the former. But there is a further constraint emanating from the interaction with other agents. In this interaction with others agency maps the moral environment as generating moral meaning. The moral environment is put together by those (abstract) 'objects' which impede agency as interaction with others (this a very figurative way of representing things, but it will do for the moment). However, upon a second look one realises that those normative 'objects' actually refer to agency, because their content is about the regulation of the conduct of agents. Earlier it was claimed that meaning and content rest on the normative patterns of action/agency. What one sees now in addition to that, is that the normative patterns¹ of action are themselves revealed through the meaning of normative sentences and words.

This is the point where the identified tension emerges: whereas, originally, I alluded to the idea that meaning is constituted through practice, now it looks for a moment that I take some specific sort of meaning, i.e. moral meaning, to be antecedent to practice. The inconsistency is levelled on the following consideration: namely that the idea of any norms for practice/action is normatively antecedent to the practice/action they regulate. Accordingly practical norms as expressed in normative sentences precede, in the sense of being normatively antecedent to, specific tokens of action: for that reason we need to ‘presuppose’ a norm or a set of norms in order to understand, for instance, that John and Daniel agreed to move John’s desk from his room into the dinning room. Admittedly the meaning of ‘agreement’, ‘desk’, ‘move’ and so on depends on the way those words are employed in a sentence and, further, upon the way the whole sentence is in turn employed by the speakers upon interacting with the environment. However, the normative pattern underlying John’s and Daniel’s agreement to move the table is laid down by an action-guiding norm that has to be presupposed in order to grasp the act of moving as the result of an agreement in that particular case. Hence although normative meaning is a category that is normatively antecedent to some token of agency, *specific norms* are, generally, made explicit only in connection to specific tokens of agency or practices. Therefore one way to understand the claim of priority is by interpreting it as saying that whereas we need an action-guiding norm in order to individuate specific tokens of agency the opposite is not the case.

Arguably, ‘being normatively antecedent’ in relation to action implies that action-guiding norms enjoy the status of necessary presuppositions for grasping tokens of action. In putting forward that claim I do not purport to argue that norms are somehow analytic truths that are knowable *a priori*. Such a claim is definitely too strong and does not seem to account properly for how things are. Norms individuate tokens of action but they are also made explicit or iterated through agent’s interaction with the environment. Normative meaning and content is shaped through the use of normative words and sentences and along with them so do norms (the meaning-exhausts-ontology thesis). Up to this point one can take norms and agency as being the two sides of the same coin. However, since no particle of the environment – including movements, sequences of movements or other physical aspects of agency – is self-interpreting in the sense of being able to generate meaning by itself, the need for accounting for normativity will remain unsaturated if one chooses to explicate normativity of action as perfectly depending or supervening upon tokens of agency.

In response to that need, I am suggesting that there is a more basic level of normativity which is common to action and (normative) meaning and which enjoys the status of a

necessary or transcendental presupposition for grouping together movements as tokens of agency and linguistic entities as normative sentences and further norms⁶⁴. That level of necessary normativity can be thought as containing some fundamental or bedrock-norms which empower normative meaning and derivatively validate every single action-guiding norm. By alluding to normative meaning (and the corresponding norms) the bedrock-norms refer equally to action, as the conjunction of the meaning exhausts ontology thesis with the use theory of meaning, have established. The bedrock-norms are pragmatic norms that refer equally to normative meaning and action. Insofar, whereas action-guiding norms are delivered simultaneously with tokens of action, their pragmatic presuppositions enjoy some sort of normative priority in relation to them. Along these lines, normativity is accounted for without assuming that action-guiding norms are analytic propositions that are knowable *a priori*. What is analytic and knowable *a priori* are the transcendental bedrock-norms that guarantee the intelligibility (or rationality) of meaning and agency. Simple action-guiding norms (of morality, law and ethics) are revealed within every-day contexts of interaction with the environment and other agents, and there is no way of an *a priori* exhaustive account of their contents. Nevertheless, it makes sense to talk of those norms as being ‘revealed’ or ‘discovered’ rather than ‘constructed’ for the simple reason that their content meets an outer conceptual limit in the form of the transcendental bedrock-norms.

This is more or less the idea that it is not up to us to construct any norm we like or, by slightly changing the point of view, the idea that it is possible that individuals or whole communities might go wrong in abiding by false/wrong norms. Besides, one should not be disturbed by the use of verbs like ‘discovering’ or ‘revealing’ in relation to norms. If the same vocabulary does not evoke complaints in connection with other abstract objects, like for instance numbers, it shouldn’t in connection to norms either. In the case of numbers, ‘objecthood’ is also granted through a semantic analysis of number-terms. There exist also – at least after Gödel’s incompleteness theorem⁶⁵ – some true propositions that escape our power of construction (i.e. proof) and pose some outer limits to what we can do with num-

64 In suggesting this I will follow the general line of argument that underlies *Discourse-theory*, or the philosophical programme that K.-O. Apel and J. Habermas developed in order to depict the normative-pragmatic presuppositions of meaning. Notwithstanding the many similarities between my conception and that of discourse-theory, there are several important differences. Vide the discussion in Ch V, *infra*.

65 Gödel’s so-called first incompleteness theorem roughly says that in any consistent theory there will always be true but unprovable sentences to the effect that the formalist hope of identifying true with provability collapses. For an introductory account in the rationale of the theorem, vide James Robert Brown, *Philosophy of Mathematics* (London and New York: Routledge, 2001), 71-78.

bers. Hence, introducing a differentiation between normative and number meaning which would justify a different treatment of their ontology, would need a special reason that does not seem to be readily available. Hence, either normative meaning is not amenable to random constructivist moves or all meanings are. Since there are firmly established counterexamples to the latter disjunctive the former should be true.

The proposed explication of normativity rests on the intuition that it is possible to reconstruct the meaning of norms in order to arrive at the fundamental pragmatic-normative presuppositions of meaning and agency tout court. It is supported by the fact that normative meaning is both generated by agency (as all meaning does) while it is about the regulation of agency. Connectedly the presuppositions for normative meaning apply equally to agency. In a way, those presuppositions constitute the groundwork of the normative patterns of agency which, roughly, consists in the conglomeration of the normative objects (norms of morality, law and so on) that are revealed in every-day practices. Along these lines, it is possible to grasp agency as incorporating irreducible normative patterns.

A non-reductionist conception of agency.

The existence of irreducible norms for action dovetails with an understanding of agency as an irreducible normative concept. It is only possible to conceive agency as generating normative patterns for intentional content (and, in particular, intentional normative content) if we explicate it as resting upon an irreducible normative groundwork. Explicated in that way, the concept of agency is able to account for both normative and non-normative content. In that case, however, normative content and meaning will have a privileged access to the normative groundwork of agency, for the reasons already stated. The normative groundwork will then consist in the pragmatic norms that 'authorise' normative meaning.

The understanding of agency as a non-reducible normative concept is informed by the reasonable idea that human conduct is not a contingent but a regulated or 'normal' activity. Indeed, as indicated earlier⁶⁶, much of the plausibility of the tenet of *intentional realism* itself rests upon the idea that intentional action interrupts the causal chain of natural events in a non-contingent way. This should be taken to suggest that agency is not subjected exclusively to the principle of causality as phenomena in the physical environment usually do (being, thus, contingent). Instead, agency can be reconstructed as obeying to a different-than-causality normativity, say, a normativity for action. On a first account, one can take

⁶⁶ Supra, Ch II.

this normativity to consist in the network of the action-guiding norms that are depicted by all normative propositions we deploy. Besides, it is a fact that we cannot refrain from deploying them because otherwise, as the idea of intentional realism and the discussion of normative reductionism suggested, we cannot fully account for action/agency.

Up to this point, a formal/semantic account of action-guiding norms, like the one pursued throughout CHs. II – IV, suffices for reconstructing them as ontologically irreducible abstract objects which warrant the existence of a distinct normative realm for action. To that degree the formal account is sufficient in blocking any reduction that would occur if one were to explicate agency as merely being a contingent natural/physical phenomenon which unfolds along the lines of the (contingent) laws of physics. Nevertheless, the semantic account cannot block contingency on the level of normative content or meaning. This is the contingency delivered in the form ‘whatever we pronounce and has the structure of a normative proposition is a valid norm’. Clearly a strictly semantic account of norms and normativity is not able to prevent norms from acquiring contingent meanings. For that one would have to undertake an analysis of the pragmatic conditions of normative meanings and argue that those meanings entail a series of *transcendental normative presuppositions* (norms) which, in the one or the other way, are connected with or point towards the (substantive) concept of autonomy. Through this move, agency can be linked up with the concept of autonomy as a substantive, irreducible concept that is able to account for the non-contingent character of agency. In this context irreducibility of agency is generated by the transcendental character of the concept of autonomy.

This way of setting up the relations between autonomy and agency, stands in line with the Kantian idea that the first causes which set in motion the causal relations between the phenomena are to be found in the *noumenal world*, or the world inhabited by ‘things-in-themselves’. In that world, first causes are identified as undetermined or free agencies that are responsible for setting in motion the phenomena in the world of the appearances (or the world we inhabit). Hence things in the noumenal world, or ‘things in themselves’, are free. Our ability as intelligent agents to reflect upon our actions leads us, according to the Kantian picture, to allocate noumenal existence to ourselves and, hence, to regard ourselves as free. The upshot of this argument says that, even though our actions are unavoidably embedded within the causal flow of phenomena, we know that we have a noumenal existence and that nothing is antecedent to the determination of our will⁶⁷. Chairs or stones, on the

67 For contemporary views containing a Kantian conception of agency vide, Christine Korsgaard,

other hand, do not have the ability to reflect upon their 'agency' or the chain of events in which they participate, with the result that they cannot attribute to themselves a noumenal existence, hence they are not free. Clearly, this is also the case for all entities that do not possess self-reflective capacities.

Normative meaning and autonomy: an outline

The picture just sketched can adequately shed light upon the importance of the meaning of normative propositions in the determination of the content of the concept of agency. Let me give a bold sketch of a possible account: meanings of normative propositions and, further, norms presuppose the meaning of a Principle or Norm of Autonomy (NoA), in order to be intelligible as signifying 'oughts'. This can be argued against the background of an analysis of the pragmatic presuppositions of normative meaning in general. NoA will be an abstract normative object which will lay down the substantive conditions of normativity or the general meaning of 'ought'. All other particular meanings of particular norms will be instances of the meaning of NoA. Moreover, all norms will be tokens or instances of NoA (as particular realisations of autonomy). On the basis of NoA and all other action-guiding norms, it will be possible to pick out bits or tokens of agency as constituting non-contingent facts. That is, facts of agency will always presuppose the existence of the one or the other action-guiding norm in order to be intelligible as facts of agency. Finally, NoA and the other action-guiding norms will be irreducible because they will feature as non-eliminable abstract objects in any account of instances (or facts) of agency, along the lines that were suggested in the discussion of the reductionism of normative concepts⁶⁸.

Having said that, one should bear in mind that there is still a large difference between the way normative meanings contribute to an account of agency and that in which non-normative meanings do. Non-normative meanings play an instrumental role in the account of human agency, namely the role of explaining agency whenever it is subsumed under the principle of causality capturing, as it were, the phenomenal aspect of agency. If, for instance, I want to spend my holiday on Santorini and I don't know that Santorini is Thira, I will buy a ticket to Santorini and not to Thira; hence, the meaning of 'Santorini' and not that of 'Thira' will account for my behaviour. This explanation might be enough for accounting

'Creating the Kingdom of Ends' in eadem, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), 188-221; also Onora O'Neil, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996).

68 Vide Ch. II.

rationally for my behaviour; however, it does not really offer any insight into the normative presuppositions of action *tout court*. The reason is that the content of my belief about ‘Santorini’ does not have any impact upon the content of the concept of autonomy, at least not in a straightforward way; but it is that content which is decisive for the determination of the normative groundwork of agency.

Things are different in the case of the *meanings of normative expressions and sentences*. In order for those to make sense as having normative meaning, as being action-guiding in other words, one will have to presuppose a principle of autonomy in order to make this normative meaning intelligible. Doing so will have a direct impact on one’s account of agency, since the principle of autonomy touches upon the issue of rational action *tout court*. As a result, the possibility of an account of normative meanings will be constitutive for the concept of rational agency. In fact the two accounts will amount to the same account of a principle of autonomy which will allow for the intelligibility of agency as a normative concept.

Overall, the important point is that in asking how normative meanings fit in an account of agency, we actually ask in a radical way the question about the normative groundwork which supports the notion of agency. The reason is that the meaning of a normative sentence cannot simply explain in a causal way bits of human behaviour, as it is the case with non-normative meanings; it must further agree with that account (along the lines of being correct): take, again, the meaning of the non-normative sentence ‘I wish to spend my holiday on Santorini’. This is enough for explaining my booking the relevant flight to Greece. In contrast, the meaning of the normative sentence: ‘whenever someone offends me I punch them’, cannot really back my punching someone who called me ‘stupid’. The reason is that one’s freedom in formulating normative sentences and, thus, depicting valid norms, is constrained already by the content of the concept of rational agency, which rests on a series of pragmatic normative presuppositions. To put it more figuratively, there are only so many valid norms to be depicted: those that are ‘approved’ or empowered by NoA and the corresponding substantive conception of agency.

The issue ramifies in the area of legal discourse: legal (normative) sentences will disseminate knowledge about the environment according to their meanings. Accordingly, as already suggested, those meanings will signify instances of autonomy and, therefore, will be relevant for picking out tokens of human agency (facts of agency). In order to accomplish the task of accounting for those meanings and their ontological counterparts (legal norms), one will have to include them into a general account of human agency (and its rationality),

as already mentioned. This account amounts in explicating agency through the pragmatic prerequisites of normative meaning and the subsequent introduction of a Norm of Autonomy. To that extent an account of legal meaning (and, further, of legal norms) will be part of a broader account of general normative meaning (and, further, of the norms of morality).

Moreover, such an account is suitable for explaining the evaluative dimension of normative propositions and corresponding norms, in accordance with Hart's initial postulation of an internal, evaluative aspect of rules. In doing so, the account of rules' evaluative dimension will play a corroborative role in connection to the anti-reductionist argument for normative entities that was offered earlier on: the reductionism account suggested that normative entities are not co-extensive with any other non-normative entities, hence that they are ontologically autonomous. However, the semantic account which was employed in order to explicate norms' ontology, subsequently suggested that an account of norms' ontology needs to be in accordance with an account of agency, owing to the fact that the semantic units which individuate normative content have an impact upon agency according to their meaning. Consequently the ontological autonomy of norms is subjected to a higher-order requirement: an account of normative meanings, and through it an account of agency. Insofar the anti-reductionist claim will be only partially satisfied unless it is supplemented by an account of the pragmatic-normative conditions of the meaning of normative propositions.

Agenda

The main purpose of Chapter V will be to flesh out an account of the pragmatic presuppositions which render normative meaning possible. In doing so I will refer to the philosophical programme that has been elaborated since the early seventies in the writings of K.-O. Apel, J. Habermas and, later, R. Alexy, mostly under the label *Discourse-theory* (from the German *Diskurstheorie*). Put loosely, Discourse-theory sets out from an understanding of sentence meaning as deriving from the validity-conditions of the corresponding acts of uttering those sentences (speech-acts). To that extent meaning is treated as being dependent upon the pragmatic rules that regulate larger units of speech activity (discourses).

The analysis of the pragmatic rules that regulate normative speech will point to the necessity for a uniform treatment of all types of normative meaning. Resting on this necessity I will attempt to explicate legal meaning (and broader legal discourses) as a species of general practical/moral meaning (and broader practical/moral discourses) along the lines of Alexy's so-called Special Case Thesis (*Sonderfallthese*).

The rest of the chapter will be spent in an effort to highlight the need for explicating

the pragmatic rules for legal/normative meaning as *substantive action-guiding norms*. Resting on the discussion of the first part of the chapter I will argue against the thesis, mainly tendered by Habermas, that the discourse presuppositions consist merely in rules for the regulation of argumentative procedures via which speakers create or construct the actual action-guiding norms of morality, ethics and law.

PART THREE

LAW'S NORMATIVITY

CHAPTER V

THE PRAGMATIC PRESUPPOSITIONS OF COMMUNICATION: A CASE FOR DISCOURSE-THEORY

INTRODUCTION

In this chapter I undertake an inquiry into the pragmatic-normative presuppositions of normative meaning. The inquiry is situated within the overall philosophical programme of *discourse-theory* which has been elaborated in the writings of Karl-Otto Apel and Jürgen Habermas¹. Even though Habermas reserves for the specific analysis of normative meaning the term *discourse-ethics*, I will not allude to the reasons for that distinction and, instead, I will use the terms ‘discourse-theory’ and ‘discourse-ethics’ interchangeably to refer to the analysis of normative meaning².

I will use the intuitions of discourse-theory in order to account for the pragmatic-normative groundwork of normative, and more specifically legal, meaning in our every day communication. It will be argued that normative meaning is conditioned by the pragmatic rules that regulate communication between speakers when they use normative expressions

1 Amongst the texts that formed the philosophical groundwork of discourse-theory the following have acquired the status of the *locus classicus*: Jürgen Habermas, ‘Was heißt Universalpragmatik?’ In Jürgen Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, (Frankfurt am Main: Suhrkamp, 1995) 353-440; idem, ‘Wahrheitstheorien’, in Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns* (Frankfurt am Main: Suhrkamp, 1995), 127-183; idem, ‘Erläuterungen zur Diskursethik’ in Habermas, *Erläuterungen zur Diskursethik*, 2nd edn (Frankfurt am Main: Suhrkamp, 1992), 119-226; idem, ‘Diskursethik-Notizen zu einem Begründungsprogramm’, in Habermas, *Moralbewußtsein und kommunikatives Handeln*, 5th edn (Frankfurt am Main: Suhrkamp, 1992), 53-125; idem, ‘Moralbewußtsein und kommunikatives Handeln’, in Habermas *Moralbewußtsein und kommunikatives Handeln*, 5th edn, 127-206. And for Apel’s work vide K.-O. Apel, *Transformation der Philosophie vol. 2: das Apriori der Kommunikationsgemeinschaft*, 4th edn (Frankfurt am Main: Suhrkamp, 1988); and his more recent *Auseinandersetzungen im Erprobung des Transzendental-pragmatischen Ansatzes* (Frankfurt am Main: Suhrkamp, 1998).

2 The reasons for that distinction are, on the one hand, marginal in connection to the present discussion and, on the other hand, they have been contested by other proponents of discourse-theory; K.-O. Apel, for instance, seems to object to such a distinction, on the grounds that it weakens the pragmatic-ethical background of communication by implying that normative meaning rests on a different kind of pragmatic conditions than non-normative meaning does. Vide Apel, ‘Auflösung der Diskursethik?’, in idem, *Auseinandersetzungen*, 727-837 (731-742).

and sentences. Resting on this conclusion I will further advance the thesis that legal meaning (and broadly law) is a special case of general practical/moral meaning (and broadly morality).

Finally the pragmatic rules that regulate communication via normative expressions and sentences will be claimed to have three features: to be necessarily valid rules; to be *a priori* knowable (via transcendental reflection); and to be substantive, in the sense of addressing action apart from speech.

TRANSCENDENTAL-PRAGMATICS, UNIVERSAL-PRAGMATICS AND THE NORMATIVE BASIS OF COMMUNICATION

The broad idea that underlies discourse theory is the thought that sentence meaning cannot be accounted independently from the pragmatic-contextual conditions of the employment of sentences by speakers who aim to communicate with each other. This thesis is argued for in the general linguistic-philosophical part of discourse-theory that consists in the two closely related programmes of *Transcendental-* and *Universal-Pragmatics*, developed in the work of K.-O. Apel and Jürgen Habermas respectively³.

Transcendental- and Universal-Pragmatics originate from ideas and thoughts which can be detected in the tradition of the analytical philosophy of language and especially in the speech acts theory of Austin and Searle⁴. For the sake of economy, I am going to use the term Universal Pragmatics (henceforth, U-P) for both programmes, as Habermas' project has been worked out in more detail over the past three decades; to that extent the discussion will not, as a principle, take into account the numerous differences between the two variants of Apel and Habermas unless they are important for the present project.

U-P assumes that certain pragmatic features of utterances admit of rational reconstruction in universal terms in the same way that phonetic, syntactic and semantic features

3 Cf. Fn. 1 and in particular Habermas, 'Was heißt Universalpragmatik?' and Apel, 'das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik', in Apel, *Transformation der Philosophie*, vol. 2, 358-435.

4 For a general discussion of Habermas' reception of Searle's ideas see Keuth, *Erkenntnis oder Entscheidung: zur Kritik der Kritischen Theorie* (Tübingen: J. C. B. Mohr, 1993), 43-111. It should be mentioned that Habermas' reception of Searle's ideas has not been left uncriticised (for a quick review of the criticisms, refer to Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, 2nd edn (Frankfurt am Main: Suhrkamp, 1986), 142-146. For Searle's own view cf. with J. Searle, 'Response: Meaning, Intentionality, and Speech Acts' in E. Lepore and R. van Gulick (eds), *John Searle and his Critics* (Oxford: Blackwell, 1993), 81-102 (89-96). The correctness of those criticisms notwithstanding, they cannot annul Habermas' project (cf. with Alexy, *ibid.* 143, fn 328.).

of sentences do. In other words U-P thematises the elementary units of speech (utterances) in the same manner as linguistics does the elementary units of language (sentences)⁵. These pragmatic elementary units of speech are further reconstructed as transcendental presuppositions of the speech as a whole. In this sense, according to Habermas⁶, every act of utterance situates the relevant sentence in relation to: i) external reality, ii) inner reality (the speaker's own world) and iii) the normative reality of the society (what Habermas describes as life-world, i.e. the shared values and norms within a specific social context). In this context, whenever a speaker is uttering a sentence, one necessarily (implicitly though), makes the following pragmatic validity claims [*Geltungsansprüche*]: One claims that what one states is true [*Wahrheitsanspruch*], that one's manifest expression of intentions is truthful [*Wahrhaftigkeitsanspruch*], and that the utterance is itself right or appropriate [*Richtigkeitsanspruch*] in relation to a recognised context⁷.

In this respect, U-P seem to constitute a simple analogy to the formal analysis of the language which is performed by *linguistics*. U-P acquire their normative dimension only when associated with the *speech acts theory*. The main intuition of the speech acts theory consists in its attempt to work out normative standards for the speech by treating utterances as complex structures containing elements both of speech and action⁸. The whole project has a pragmatic character, precisely because it endeavours to derive the normative ground-work of the speech from certain 'contexts' of human action. Searle has tried, for instance, to determine rules for the act of 'promising'. These rules include, amongst other things, the honesty of the one that promises, as well as their intention to relate their promise to a moral obligation⁹. These rules are derived from the 'act-related' part of a speech act ('I promise that...'), which is also called the *illocutionary force*¹⁰. The illocutionary force seems to have a strong influence upon the *locutionary* meaning, or the second part of a speech act, which mainly indicates what has been said ('...that tomorrow I will pay you back'). The influence consists mainly in the illocutionary force's prescribing of the validity conditions for a happy employment of the locutionary meaning of the speech act: according to this picture, what is said (the locutionary meaning) ought to abide by the criteria which the illocution pro-

5 Habermas, 'Was heißt Universalpragmatik?' 359.

6 Habermas, 'Was heißt Universalpragmatik?', 388-389.

7 Op. cit., 389

8 For a concise presentation, vide Keut, *Erkenntnis*, 49-54.

9 Keuth, *ibid.*, 49.

10 This is the terminology used by Austin; Habermas' prefers to call the same part of a speech act *the performative part*. For a discussion of the relevant terminology, see Alexy, *Theorie*, 143n.

nounces, otherwise there is the danger that something else or nothing at all is said. In this sense the illocutionary force has a determining impact on the meaning of what is said. The impact consists in a series of validity criteria that are generated by the illocutionary force of speech acts.

These criteria are *pragmatic* in nature and are embedded into rules which are conceived as the (necessary) conditions of a concrete acting-context (for instance, promising). The method for grounding those rules is that of transcendental deduction¹¹. Those rules are further articulated as a corpus of discourse rules that envisage communication via language as a (rational) discourse with a minimum moral/practical content. The *discourse rules* consist in a series of pragmatic rules (Robert Alexy lists 29 rules of the general practical discourse¹²), amongst which count the claim for correctness (i.e. the claim that necessarily accompanies any act of asserting a sentence), a group of formal rules which guarantee coherence and consistency, as well as rules that contain substantive criteria for the equal treatment of persons and situations¹³. Against the background of this pragmatic normative network, discourse-theory proceeds to ground a principle of universalisation¹⁴ that determines the validity of the sentences that contain substantive action-guiding norms that are generated by the discursive procedure. The status of the discourse rules is not uncontroversial: Habermas prefers to explicate them as pure speech-norms that regulate argumentative procedures which aim to ground correct (true/right) sentences¹⁵. However, as I will argue in several occasions in this chapter, a strict procedural explanation of the discourse rules seems to fall short of providing a sufficient ground for discourse-theory.

Clearly a lot of the persuasive power of the philosophical programme that rests on U-P depends on the grounding method of the discourse rules. In offering an analysis of the main argument for the validity of discourse rules I will limit the discussion to the most elementary of the discourse rules, i.e. the so-called *claim to correctness* [*Anspruch auf Richtig-*

11 Vide the discussion on the claim to correctness in the next section, *infra*.

12 Vide, Alexy, *Theorie*, 234-255.

13 Ibid. 234-255. Vide also Alexy, 'A Discourse-Theoretical Conception of Practical Reason', *Ratio Juris*, 5 (1992), 231-251.

14 Instead of the term 'universalisation principle' Habermas prefers to use the term 'discourse-principle' (*Discursprinzip*), or <D> in connection to practical discourse. The content of <D> is; 'valid are precisely those action-guiding norms, about which all potential persons affected could agree as participants in rational discourses', cf. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, 2nd edn (Frankfurt am Main: Suhrkamp, 1992), 138. For his discussion of the connections between the universalisation principle and the discourse-principle cf. with Habermas, 'Diskursethik – Notizen zu einem Begründungsprogramm', 103n.

15 Vide in particular Habermas, 'Diskursethik – Notizen', *passim*.

keit]. The reason for that is, roughly, that this claim constitutes the most elementary pragmatic rule against whose background all other discourse rules can be developed¹⁶. I will further confine myself to an analysis of the claim to correctness only in connection with practical/normative sentences (sentences of law and morality), despite the fact that discourse-theory takes it to equally apply on both theoretical and practical assertions.

Two reasons support this choice: first the fact that a detailed discussion of the validity of theoretical sentences would escape the scope of the present dissertation. Second, and more important, the fact that contrary to the uniform treatment of theoretical and practical discourses undertaken by the proponents of discourse-theory, the claim to correctness seems to incorporate a distinctly *substantive* (in the sense of action-guiding) dimension when raised in the context of practical sentences¹⁷. This observation will be polished as the thesis that the validity of normative sentences implicates questions of material correctness (or even justice) which can be dealt with appropriately only if the concept of correctness is related to some *substantive moral theory* (in which discourse participants feature as *autonomous agents*¹⁸). Connectedly the claim to correctness concerning practical sentences cannot be taken to merely correspond to a claim to truth in the spirit of the semantic theory of truth¹⁹, as perhaps it is the case with the claim to correctness regarding theoretical sentences.

One further methodological remark concerning the ensuing discussion: in the context of discourse-theory, the pragmatic rules that underlie speech are usually referred to as *standards for the validity* of certain utterances. Broadening the scope of this idea I will refer to the pragmatic rules as constituting *rules for the regulation of the meaning of the uttered sentences*. This will dovetail with the understanding of the concept of ‘meaning’ in the context of the theory of meaning-as-use that was advanced in Ch IV. As it was argued there the meaning of a sentence is exhausted in its use or in the conditions for its employment. Insofar as the conditions for the use of sentences can be legitimately taken to constitute validity conditions for the corresponding utterances, I will hereafter refer to the pragmatic rules for speech as *rules for meaning*.

16 Cf. Alexy, *Theorie*, 165-168. Also Habermas, ‘Diskursethik – Notizen’, 96n.

17 Vide Alexy, *Begriff und Geltung des Rechts* (Freiburg i. Br.; München: Alber, 1992) 126-136; idem, ‘Probleme der Diskurstheorie’ in Alexy, *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie* (Frankfurt am Main: Suhrkamp, 1995), 109-126 (120-121); also cf. with G. Pavlakos, ‘Persons and Norms: On the Normative Groundwork of Discourse-Ethics’, *ARSP*, 85 (1999), 7-22 (7, 8).

18 The concept of autonomous persons will be debated in Ch VI, *infra*.

19 For the main tenets of the semantic theory of truth vide Ch IV, *supra*.

THE CLAIM TO CORRECTNESS: THE CORE OF PRAGMATIC RATIONALITY

Robert Alexy has advanced a transcendental argument for grounding the claim to correctness regarding legal propositions²⁰. The argument's scope refers to legal sentences and terms but can be applied *mutatis mutandis* to any normative sentence. Alexy's argument for the claim to correctness is a type of the more general argument that the act of uttering a normative proposition (Np) presupposes a series of pragmatic rules which render Np intelligible. Since, *de facto*, we utter normative propositions in our every day communicative practice, the conclusion to be derived is that those pragmatic rules must be necessarily valid.

Alexy, like many other proponents of discourse-theory, employs the apparatus of *performative contradiction* in order to show that the connection between a pragmatic rule R and the meaning of a normative proposition Np is compelling: according to the performative contradiction, any Np that does not respect the content of a valid pragmatic rule R entails a contradiction of the form $\Box \neg p$. The contradiction is, further, performative – or pragmatic – because rule R is evoked through the uttering of Np. Let me specify the transcendental construction in relation to the claim to correctness.

The transcendental argument

A transcendental argument concerning the claim to correctness has, roughly, the following form:

P1: We employ legal propositions (statements).

P2: The act of uttering them necessarily presupposes the rule R: 'normative propositions raise a claim to correctness'.

C: Necessarily rule R is valid. (or, 'necessarily normative propositions raise a claim to correctness').

Or

P1: Np

P2: Np $\rightarrow \Box R$

C: $\Box R$

20 Vide Alexy, *Begriff*, 64-70; and for a summary of the argument in English idem, 'On Necessary Relations Between Law and Morality', *Ratio Juris*, 2 (1989), 167-183 (177-183). It should be noted here that there are several authors who accept the conception of legal discourse as a rational argumentation without explicitly referring to the claim to correctness and the connection between rationality and practical reason that is inherent in the work of Habermas and Alexy. For instance see Manuel

Clearly P2 introduces too much content in what can be taken to be a contestable way; this is where the device of performative contradiction is employed. This develops its justificatory power by exploiting the feeling of absurdity or inconsistency, as it were, that we experience whenever we explicitly deny the pragmatic rule R, which is implied through the act of uttering Np. Thus, the counterintuitive effect of any normative proposition of the form ‘ Φ ought to be done, though Φ is wrong’, functions as an indication or proof for the fact that the act of uttering a normative proposition entails the pragmatic rule R: ‘normative propositions raise a claim to correctness’.

In particular in the context of legal discourse a pragmatic contradiction would be instigated if a legislator were to pronounce the constitutional norm²¹:

(1) ‘X is a sovereign, federal and unjust state’.

or a judge were to issue the decision²²:

(2) ‘The defendant is – wrongly, because the valid law was interpreted incorrectly – sentenced to life imprisonment’.

Both these propositions imply a performative contradiction to the extent that their content contravenes the claim that is raised through the act of their pronouncement²³. The contradiction establishes, indirectly, the necessary validity of the claim to correctness in relation to any legal proposition. This conclusion is used in order to support the further thesis that legal propositions are practical to the extent that they raise a claim to correctness. This thesis is put forward as the *Richtigkeitsargument* (rightness argument). It is based on the following implicit syllogism:

Atienza, ‘For a Theory of Legal Argumentation’, *Rechtstheorie*, 4 (1990), 393-414.

21 Vide Robert Alexy, *Begriff*, 63-70. Also his ‘On Necessary Relations’, 167-183 (178).

22 Alexy, ‘On Necessary Relations’, 179.

23 It should be noted that in the second case, of the judicial decision, the contradiction needs to be more than a legal contradiction, i.e. of wrongly applying a statute contrary to the requirements of a legal system. This can be granted, if we assume that, despite proclaiming so, the judge erroneously believes that he or she misapplied the statute, where actually the case is that the interpretation was legally correct. Only in this case (2) entails more than a contradiction within the scope of a legal system, one that can be taken to constitute a performative contradiction. See Alexy, ‘On Necessary Rela-

- a. A proposition is practical if and only if it raises a claim to correctness²⁴.
- b. legal propositions necessarily raise a claim to correctness.
- c. legal propositions are necessarily practical.

Hence the fact that the claim to correctness is a necessary condition for legal propositions makes them a species of practical propositions. Accordingly the pragmatic rule of correctness constitutes something like the formal aspect of the rightness argument, as it prescribes that legal propositions need to raise a claim to correctness. On this level the content or the standards of correctness are not further specified.

This formal aspect of the rightness argument is supplemented by a second substantive aspect which is advanced as the *morality thesis* [*Moralthese*]²⁵. According to this thesis, the correctness of normative (legal) propositions is measured against the idea of a *right morality*. In advancing the *Moralthese* Alexy adheres to the idea that correctness regarding standards for action (normative utterances) cannot but itself refer to action and hence to designate material criteria for acting correctly. Contrary to what one would expect, the idea of a right morality is elaborated as a *procedural notion*; Alexy seems to designate it as a *justified morality*²⁶. This justification takes place within rational discourses, which operate according to certain pragmatic rules which, along with the rule of correctness, are conceived as necessary presuppositions of the act of uttering practical propositions. Those rules are not yet themselves action-guiding standards, in the sense of providing reasons for action, but constitute the pragmatic presuppositions of the discursive procedure, whose outcome are justified (moral) action-guiding norms²⁷. This conception yields a picture of the right morality as the outcome of procedural rightness²⁸.

tions', 179-180.

24 Of course the point of discourse-theory is to establish that the claim to correctness is entailed by the act of uttering both theoretical and practical propositions. Interpreted this way, the stated argument is rather trivial. It merely says that a sub-class of propositions raises a claim that, anyway, all propositions do! Accordingly the conclusion should just be that 'all legal propositions are propositions' or that 'all legal propositions are either theoretical or practical'. However I prefer to associate with practical propositions a more comprehensive notion of correctness than the one referring to theoretical propositions. In doing so I abide by Alexy's suggestion that correctness in the realm of practical reasoning is connected with the idea of a body of substantive criteria for action (the idea of a right morality). Thus, at present, the stated argument anticipates the implications of this line of reasoning which is going to be discussed in more detail in this and the next chapter.

25 Alexy, *Begriff*, 126-136.

26 Alexy, *Begriff*, 136.

27 This is the Habermas' proceduralist conception of practical rationality which is going to be criticised in the last section of this chapter, *infra*.

28 Vide Alexy, *Theorie*, 410 n.; see also Alexy, 'Discurstheorie und Menschenrechte' in idem, *Recht*,

The rightness argument – in both its formal and substantive aspect – supports the broader claim that the legal argumentation or discourse is a *special case* or *Sonderfall* of the general practical argumentation or discourse, the so-called *Sonderfallthese* – henceforth SFT²⁹.

The Sonderfallthese (SFT)

The Special Case Thesis contains the claim that legal or juridical discourse is a special case of general practical discourse, namely the discourse concerning the existence and the validity of normative propositions and/or the conditions under which an action of a rational agent is valid/right. The claim of the SFT refers to all types of legal discourse, institutionalised or not: the plaintiff's argumentation in the court-room, the law professor's opinion delivered at his lectures, the lawyer's advice, the legislative debate in the parliament, even the journalist's comment on a court's decision stated in the morning paper's legal column³⁰. The common denominator in all these types of discourse is their reference to valid positive law, a feature which at the same time distinguishes legal discourse from other types of practical argumentation. The SFT has three components: (1) legal questions are practical insofar as they ask what must/is allowed to be done/omitted³¹. This is further supported by the claim that legal questions like all other practical questions raise a claim to correctness (2), which has already been discussed. Finally, the SFT is supplemented by a restrictive argument which defines legal discourse merely as a special case of general practical discourse: legal discourse is a special case of general practical discourse due to its being bound upon a series of restrictions. These include the positive law, the judicial precedents, the legal dogmatic and the procedural law's provisions³² (3).

Vernunft, Diskurs, 127-164.

29 Vide R. Alexy, *Theorie*, 263-272; 349-359. Idem, *Begriff*, 126-136; idem, 'The Special Case Thesis', *Ratio Juris*, 12 (1999), 374-384. To the extent that some degree of interconnection between law and morality has been implicit from the beginning of this essay, the SFT is a useful tool in conceptualising that relation. It should further be noted that the *Sonderfallthese* has not been received without criticism; for a recent exposition of the criticism see instead of others Armin Engländer, 'Zur begrifflichen Möglichkeit des Rechtspositivismus. Eine Kritik des Richtigkeitsarguments von Robert Alexy' *Rechtstheorie*, 28 (1997), 437-485. Part of the criticism of SFT originates from inside the camp of Discourse-theory, despite the fact that its authors appear to endorse the claim to correctness. Vide Habermas, *Faktizität*, 283-291. Also Klaus Günther, *Der Sinn für Angemessenheit. Anwendungsdiskurse in Moral und Recht* (Frankfurt am Main: Suhrkamp, 1988); and for a summary of his criticism in English refer to his 'Critical Remarks on Robert Alexy's 'Special-Case Thesis'', *Ratio Juris*, 6 (1993), 143-156.

30 Alexy, *Theorie*, 17-49.

31 Alexy, *Theorie*, 263.

32 Ibid. 34, 263 n..

The SFT, via the claim to correctness, associates the validity claims of legal normative propositions with the claims of the normative propositions in morality and, broader, in general practical reasoning. Legal norms and moral norms rest, on the supposition of SFT, on a common pragmatic-normative bedrock which must be presupposed in order to render those norms correct or valid. This bedrock contains a set of meta-norms that, like the norm postulating the claim to correctness, can be backed by the method of transcendental deduction. The task of grounding and finally spelling out the content of those meta-norms is undertaken by the discourse-theory of law (regarding legal argumentation) and, broader, the general discourse-theory which in regard to moral or general practical argumentation is usually referred to as discourse-ethics. Discourse-ethics takes the level of the pragmatic meta-norms to consist in procedural rules or rules for the regulation of argumentative procedures. These rules are procedural in the sense that they ‘accomplish’ or better respond to the claim of correctness by organising argumentative procedures which can result to justified (right) normative propositions, moral or legal according to the case. These rules regulate the argumentative procedure by dividing burdens and rights among speakers and providing criteria for the validity of the various argumentative speech acts through which the speakers agree about the valid (action-guiding) norms, moral or legal, that will regulate their every-day lives. In this sense the rules of the argumentation are merely rules for the speech and not action-guiding norms, as are the practical norms grounded through the discourse. This is further the reason why the rules of the argumentation cannot directly provide substantive criteria (in the sense of criteria for action) for the grounding of the moral or legal norms that constitute the object of the discourse. Thus discourse-ethics is alleged to constitute a modern, *post-conventional* – as Habermas likes to call it – ethical theory that puts the emphasis on a procedural framework of norm-grounding that guarantees practical rightness. Framed in this way discourse-ethics is alleged to avoid absurd moral ontology while guaranteeing a *discursive* (as opposed to *monological*) grounding of normative propositions that realises in the best way the universalisation principle (which is taken to be the condition for the validity of every practical norm).

PROCEDURE AND CORRECTNESS

The procedural explication of the normative meta-level of the validity of normative propositions, undertaken by discourse-theory, might turn out to be difficult to reconcile with the claim to correctness, particularly to the extent that the latter is taken to incorporate the sub-

stantive dimension of a right or objective morality³³. The reason is that such a substantive dimension postulates objective criteria for normative validity, whereas a procedural understanding thereof introduces a high degree of relativity. When one understands the pragmatic meta-norms as being rules only for speech, their objective existence as standards of normative validity is relativised by the contingent ways in which actual discursive or argumentative procedures are realised. This comes about when, in a procedural model, the normative impact of the pragmatic rules is exhausted in the way the argumentative procedure happens to be realised: then the pragmatic rules, somehow, stand and fall with the actual performance of the discursive procedure; there is no other objective standard, as it were, 'external' to the current discursive procedures that could serve as a criterion of correctness or standard of criticism for the concrete normative propositions that are generated by the discourse.

The problematic character of such an understanding is rather acute in the case of legal discourses. There, it is very often the case, that the 'pure' discursive procedure which is constitutive for the justification of normative propositions, is disrupted by juridical restrictions. Actual rules of legal argumentation are often subjected to a series of restrictions which do not aim at practical rightness but serve other more instrumental considerations (interests of the disputing legal parties, judicial precedent, etc. – hence the speciality proviso of SFT). What is the conclusion to be drawn in such cases? Should our judgement, as to whether legal discourses are or are not practical, depend on the degree that their procedures abide (or do not abide) by the procedures of the general practical discourse? The answer will be probably affirmative as long as the norm-grounding *procedure*, the discourse, is built in the content of pragmatic or communicative normativity. On such an understanding every time the legal discourse does not follow the prescribed discursive procedure (which is very often the case), it will cease to be a discourse, hence legal propositions will be grounded on considerations other than rightness, in fact they will probably stop raising a claim to correctness. In other words, any structural disconnection between the legal (or other special) and the general practical discourse will correspond to a substantive disconnection between legal and moral norms. But to concede this would be tantamount to saying that the claim to correctness is contingent and not necessary, which is directly in breach of the transcendental grounding of that claim.

A way to avoid this conclusion would be to say that the restrictions of the special discourses (like the legal ones) are justified on practical or moral considerations that have

33 Cf. with fn 17, *supra*.

been validated through general practical discourses that range over the special/legal ones. Some proponents of discourse-theory³⁴, have argued, along these lines, that the restrictions of legal argumentative procedures or discourses need not impair the practical character of law. They can be shown to be justified through substantive reasons that were validated within a general moral-practical discourse, whose procedural aspect is purely shaped according to the pragmatic rules of communication. There are two, at least, arguments usually deployed in support of that claim: The 'restricted', in the sense of efficiency-oriented, legal discourse is, on the one hand, justified owing to its being finite. It puts an end to the infinite search for rightness of the general practical discourse by producing concrete decisions/solutions in relation to concrete problems³⁵, thus guaranteeing the efficiency of practical discourse. On the second consideration legal discourse replaces moral motivation – which is alleged to be optional for the agents – with a more effective sanction-based motivational model, thus bridging the notorious gap between the *principium dejudicationis* and the *principium executionis*, in other words the gap between the knowledge of the right and the motivation to act according to it.

These arguments fall short of justifying a procedural explication of the claim to correctness. This is, roughly, the reason: the issue whether moral reasons might restrict the practicality of law can only be relevant if law is in the first place practical itself; it is only then that law will be answerable towards any kind of practical argument; but this would entail that legal propositions raise the claim to correctness. Besides, for moral considerations to be valid in the first place, they must necessarily raise a claim to correctness. This necessity is independent of any actual procedure or discourse. Hence legal normative propositions will, independently of the procedure that produced them, raise a claim to correctness. Any justification of the discrepancies of juridical discourse will be possible on the basis of the claim to correctness. In other words, it is not the procedure that creates the claim, but the claim which regulates the procedure, by making it answerable to practical reasons. If we consider under this scope the case of the practical character of legal norms, it would be totally uninformative, to say that they are not practical since they are not the object of practical discourses, or because legal discourses are not practical³⁶. Such a statement would

34 Vide K. Günther, 'Critical Remarks' 145; Alexy, *Theorie*, 37.

35 Cf. with R. Alexy, *Theorie*, 37. See also K. Günther, 'Critical Remarks', 145n.

36 This seems to be the objection advanced by some scholars who appreciate the value of discourse-theory, but argue that it is not applicable in the realm of legal reasoning. Vide E. Christodoulidis, *Law and Reflexive Politics*, Law and Philosophy Library, vol. 35 (Dordrecht: Kluwer, 1998), Ch. 3; E. Melissaris, 'Law and the End of Discourse', (unpublished doctoral thesis, University of Edinburgh,

hardly touch upon the issue of practicality. Any evidence that legal argumentation cannot be taken to be a proper practical discourse, could merely raise doubts in concern to the appropriateness of the discursive procedure and eventually postulate its amendment.

If the priority of the claim to correctness is to be sustained, then it should be linked up with *objective criteria of correctness as constituting pragmatic norms that are necessary presuppositions for the validity of all normative propositions*. These pragmatic norms cannot differ from case to case according to the way argumentation happens to unfold. Were the opposite true, those rules would be altered not only in the case of legal argumentative procedures but also in many cases of ‘pure’ of practical or moral discourses. Namely, there is nothing that can guarantee that an actual practical discourse, no matter the grade of freedom it enjoys, can implement a perfect or immaculate procedure. But the notion of an ‘immaculate’ procedure should not even be close to being a desirable ideal, because the pragmatic rules for normative meaning do not in the first place aim to organise discourses. The fact that they certainly posit some strict standards for the conduct of discourses, is only a secondary effect of theirs. Their primary role is to provide uniform standards for the soundness and validity of normative propositions and the norms depicted by them.

In contrast to the standard conception of discourse-theory, I am going to argue that, the idea of the right morality or the right standards against which the claim of correctness of normative propositions is to be measured, is constituted by a set of elementary pragmatic rules (the aforementioned discourse-rules) that exist in virtue of transcendental necessity. Clearly those norms are revealed, as all other normative entities, in the structures of language; however, their validity does not presuppose any other normative entity, hence they are transcendental-pragmatic. Those rules lie on the same level with the claim to correctness, and in fact, provide the substantive criteria for its satisfaction. That is they provide criteria for the correctness of action³⁷. Only if this substantive dimension is ascribed to the pragmatic rules, can they fulfil Alexy’s ideal of a ‘right morality’. In that case the ‘right morality’ is a set of pragmatic norms of correctness that are substantive or categorical in their quality. This is by no means a dispensable idea; at least not within the context of the claim to correctness. If the claim to correctness is necessary, so is a substantive conception of the pragmatic-normative standards of correctness. Conversely, were one to adopt a procedural (or speech-regulating) understanding of those normative standards, then one would

2001); idem ‘The Hurried Justification of Sanctions’ in *Law and Critique*, 12 (2001), forthcoming.

³⁷ This claim will be discussed in detail in the last part of the chapter, *infra*.

be dispensing with the claim to correctness as a necessary claim raised by normative propositions. Not the least so because the claim to correctness points towards a notion of correctness which exists *ex ante*, before the discourses' actual taking place, while the procedural explication thereof implies that what is right and what is wrong is specified *ex post*, i.e. after the discourse with its substantive content and substantive conclusions has satisfied all procedural tests. On the proposed conception the notion of discourse *is itself a notion in need of justification* and cannot provide the last instance of justification.

The claim to correctness and the idea of discourse will be much better off if a bolder stance is adopted towards the pragmatic presuppositions of normative meaning. That is, if the pragmatic presuppositions are understood *as substantive or categorical reasons* that provide *the standards of correctness* and, further, postulate practical discourses as the most appropriate way for grounding specific action-guiding norms. To that extent, the claim to correctness generates a *meta-ethical position* which is conceptually prior to the methodological framework of discourse-ethics. The meta-ethical position implies a cognitivist stance regarding the possibility of objective justifications of normative propositions³⁸. It is this meta-ethical position which justifies the idea of discourse as the right procedure for the grounding of normative propositions. To that extent all actual discourses are to be measured for their appropriateness against the substantive norms referred to by the claim to correctness. For those of the actual discourses that do not pass the test there is a strong assumption that they should be either amended or fully abandoned and substituted with more appropriate ones³⁹.

This conception of the pragmatic conditions of practical discourses is particularly fruitful for defending the SFT. The argument for the interconnection between law and morality is advanced, as mentioned, on the supposition that there is a necessary conceptual connection between legal and general practical (i.e. moral) propositions, owing to the fact that both sets of propositions raise the same claim to correctness, hence, they are analyti-

38 Robert Alexy pointed to me that cognitivism regarding the standards of practical correctness will presumably assume different degrees of strength, depending on the level of the practical discourse. Hence in relation to the fundamental transcendental-pragmatic rules of practical argumentation, the degree of cognitivism will be high; conversely, simple action-guiding norms that are *generated* by the argumentative procedure in relation to concrete contexts will enjoy a lower degree of cognitivism. However that may be, if cognitivism on the fundamental level of the discourse principles can be established, then low-level norm-generation will be less of a 'construction' and more of a 'discovery' since the transcendental norms will provide for categorical standards of correctness.

39 For a comprehensive critique of the proceduralist ideal of correctness within discourse-theory, vide Philippos Vassilogiannis, 'Constitutional Uses of the Argument for the Certainty and the Security of Law' (in Greek) (unpubl. doctoral thesis, University of Athens, 1996), CHs V and VI.

cally indistinguishable. This thesis is only satisfied if it is conceded that legal norms fall under the same correctness-criteria with all other practical or moral norms. These criteria will then constitute genuine normative facts (normative abstract objects) that are revealed within linguistic or semantic structures, according to the strategy developed in the previous two chapters. Understood this way, the correctness criteria for legal norms can successfully resist the most prominent criticisms put forward against the SFT.

ON THE NECESSITY OF THE INTERCONNECTION BETWEEN LAW AND MORALITY

From the objections directed against the SFT, the most far-reaching are those that question the validity of the rightness-argument in its different aspects. Prominent amongst them are the criticisms of Eugenio Bulygin, advanced in a recent paper which elaborates on earlier versions of his objections to the SFT⁴⁰. This author contests the necessity of, first, the validity of the pragmatic rule that contains the claim to correctness and, second, of the necessary relation between legal and moral norms (or norms of practical reason). In the discussion that follows, I assume Bulygin's arguments to squarely summarise the most effective criticism of the rightness argument.

At first blush, Bulygin's criticisms seem to make a strong case against the SFT. However, upon further reflection, his reasoning instead of being conclusive, rather shows that the necessity claims involved in the SFT are much more complicated than one initially might have assumed. I believe that the appreciation of this complexity, undeniably to be credited to Bulygin's subtle argument, can be exploited towards a successful defence of the SFT against the same author's criticisms. On the other hand, this appreciation can lead to a reconstruction of the way discourse-theory thematizes the pragmatic claims of discourses and the way it understands the norms that contain those claims.

Bulygin directs his first doubts against the justificatory modus of the *performative contradiction*. Though he does not discuss this issue in detail (in fact he seems to concede it to the proponent of the SFT), I take the opportunity for a brief comment, precisely because the notion of necessity is introduced in the discussion through the devise of the performative contradiction.

40 Vide Eugenio Bulygin, 'Alexy's Thesis of the Necessary Connection between Law and Morality', *Ratio Juris*, 13 (2000), 133-137.

Probably the most classical example of transcendental deduction is Kant's justification of the ultimate principle of practical rationality, the so-called Categorical Imperative (CI). In its initial formulation, also known as the Formula of Universal Law, CI states that:

Act only on that maxim through which you can at the same time will that it should become a universal law⁴¹.

Kant takes this formula to be knowable *a priori*, that is via reflection on the presuppositions upon which agents formulate the maxims (i.e. the concrete, subjective principles) which guide their action. More specifically Kant says that each time agents choose their principles for action they should want that they become universal laws or, otherwise, they entangle themselves into some sort of *contradiction*. One of the examples he offers is the maxim 'promises should be kept'; in complying with this maxim one should want that every other agent would do the same. Conversely, one cannot reasonably want that people break their promises, otherwise, one would entangle oneself in a serious contradiction, since the validity of that maxim would entail that the *object of promising*, i.e. promises, contracts, agreements, and so on, be annulled⁴².

Disregarding the fact that Kant in several occasions declares as universalisable maxims that we would not accept as universal laws nowadays, the point of his transcendental reasoning is clear: the norm that regulates the validity of our practical principles (i.e. the Categorical Imperative) can be known *a priori* through the realisation that, unless we presuppose it, we will end up committing ourselves to maxims that are self-contradictory. To that degree *contradictions* seem to constitute the core of transcendental reasoning. They are in a way the means for establishing the indispensable character of the items that a transcendental argument intends to establish as being knowable independently from experience, in a *priori* way.

Connectedly the device of performative contradiction can equally be taken to constitute the core of a transcendental argument. The difference here is that the argument refers to the pragmatic presuppositions of the act of uttering sentences/propositions that contain

41 Vide I. Kant, *The Moral Law. Groundwork of the Metaphysic of Morals*, trans. and analysed by H. J. Patton (London: Routledge, 1991), 84.

42 Cf with Kant, *ibid.* 84-86.

maxims, while what is claimed to be *a priori*, on pain of contradiction, is a set of *pragmatic* rules that regulate the *performance* of those utterances (hence the term performative contradiction). Insofar as the pragmatic transcendental argument is a species of the Kantian method of transcendental deduction, any attempt to refute it will have to convincingly argue that transcendental arguments are in general flawed.

The nature of the necessity involved

Instead of rebutting transcendental reasoning *tout court* it is far more interesting to investigate the nature of the necessity established through the method of performative contradiction. Let me examine some of the options available :

- (a) *Logical necessity*; this is the necessity induced by the laws of logic. An example of logical necessity is the proposition 'it is not the case both that R is a rule and that R is not a rule'. This necessity involved is logical because it rests on the logical law of non-contradiction. Clearly the necessity of the proposition: 'all legal norms raise a claim to correctness' is not of the sort of a logical necessity.
- (b) *Conceptual necessity*; this is a more promising candidate. Conceptual necessities are usually granted on the basis of conceptual analysis in connection with the application of the laws of logic. A simple species of conceptual necessity is the one connected with the proposition: 'it is not the case both that George is a bachelor and that George is a married man'. The necessity involved here is not a logical necessity since the concept bachelor is not a logical concept. Only a further analysis of that concept would amount to the exposition of a strict logical necessity of the form presented under (a). Propositions of that form are true in all possible worlds in virtue of the laws of logic plus definitions, hence the conceptual character of the necessity. Alexy seems to prefer to capture the necessity involved in the claim to correctness as constituting a conceptual necessity: thus, normative (legal) propositions by conceptual necessity raise a claim to correctness. Insofar he is claiming something like the following: the claim 'it is not the case both that p is a legal norm and that p does not raise a claim to correctness' is conceptually necessary.

Arguably, there is a difficulty concerning the availability of an analysis of the concept 'legal norm' through a definition that would contain the expression 'claim of correctness', or any equivalent expression. To that degree, there is a point to be conceded to the opponents of the SFT. Be that as it may, it is possible to argue that a similar analysis could occur on grounds other than those offered by logical or conceptual necessity. Such grounds could be

provided through a different sort of argument, namely a metaphysical argument. Metaphysical arguments do not rely merely or exclusively on logical or conceptual rules in order to ground the necessity or the possibility of the claims they advance⁴³. Furthermore, the claims advanced through metaphysical argument concern not merely propositions but states of affairs, to the extent that the necessity involved, cannot simply be represented as a matter of logical contradiction (or, even, conceptual contradiction)⁴⁴. Rather, the necessity involved constitutes a distinct kind of necessity, a metaphysical necessity.

- (c) *Metaphysical necessity*; this is the necessity traditionally connected with claims about certain states of affairs rather than merely propositions and whose necessity cannot (merely) be explicated in terms of logical laws and/or definitions of the concepts they contain. Take the example of the proposition 'water is H₂O'⁴⁵. This proposition is true in all possible worlds⁴⁶, in virtue of a necessity based on ontological rather than formal or conceptual grounds. Of course, any metaphysical necessity will also be a logical/conceptual necessity in the broader sense. I am inclined to suggest that metaphysical necessity is the sort of necessity implied by transcendental arguments⁴⁷. It is, hence, along those lines that the necessity of the proposition 'normative (legal) propositions raise a claim to correctness' should be evaluated.

Once we are more enlightened as to the nature of the necessity involved in the initial transcendental argument, there are some new attractive alternatives at hand for tackling the complicated issues concerning the necessity of the claim to correctness and the subsequent thesis of the necessary connection between law and morality (or practical reason).

TRANSCENDENTAL ARGUMENT AND METAPHYSICAL NECESSITY

Metaphysical necessity, as already declared, is the necessity concerning states of affairs or facts which is granted on ontological grounds, or on 'how things really are'. Accordingly,

43 Vide E. J. Lowe, *the Possibility of Metaphysics* (Oxford: Clarendon Press, 1998), Ch. 1 (8-16).

44 Ibid. 9-10.

45 Ibid. 15. Other examples include the claims: 'nothing is both red and green all over at the same time', or 'the Morning Star is the Evening Star' etc.

46 For worlds that do not contain water, the proposition can be rephrased as 'for any x, x is water if and only if x is H₂O'; then the initial proposition 'water is H₂O' turns out to be vacuously true in all worlds in which water does not exist (or, according to the rephrased sentence, in the worlds in which nothing is water and in which, by the same token, nothing is H₂O). Vide Lowe, *The Possibility*, 15.

47 See also the views of Robert Stern in his *Transcendental Arguments and Scepticism* (Oxford: Clarendon Press, 2000), 59-63, where he argues that transcendental claims fall into the same class with metaphysically necessary truths (however, this author does not seem to distinguish between metaphysical and conceptual necessity).

that ‘water is H₂O’ is a necessary proposition, has to do with the way water is, rather than with some laws of logic. To that degree, metaphysical necessities seem to be knowable somewhat *a posteriori*, in contrast with strict logical necessities that are, characteristically, knowable *a priori*; hence, metaphysical necessities are, arguably, depicted in synthetic rather than analytic propositions. However, even if metaphysical necessity involves *a posteriori* knowledge, it is not exhausted in that kind of knowledge. Not the least so, because the whole point of metaphysical argument is to entrench the metaphysical boundaries of what is possible, in the space of which experience will discover what is actual. Without the metaphysical demarcation of the possible, experience alone is not in a position to determine the actual⁴⁸. The delimitation of those boundaries consists in providing acceptable metaphysical principles which establish the actuality of a certain state of affairs, and not in whether the propositions describing them entail merely logical contradictions⁴⁹. Insofar metaphysical necessity involves both *a priori* knowable principles and *a posteriori* knowable facts.

Back to the claim to correctness now. The statement ‘all legal propositions raise a claim to correctness’ is a metaphysically necessary proposition. Its necessity is ontological in the sense that it is true in virtue of the nature of legal (normative) propositions or of the fact that legal propositions raise a claim to correctness. The performative contradiction – for those who feel it – refers precisely to that nature. Now, there are a couple of different options concerning the way of presenting the *a priori* (metaphysical, as it were) principles that delimit or render possible in the first place the fact that legal propositions raise a claim to correctness:

(i) The first option available, is to reconstruct the fact that ‘legal propositions raise a claim...’ as the normative fact⁵⁰ that ‘legal propositions ought to raise a claim ...’. Then the necessity of the transcendental argument will refer to the normative fact (or the rule) R: ‘legal propositions ought to raise a claim to correctness’, or Op. And in a symbolic language

(Op). Thus the ontological basis for the validity of the metaphysical necessity will consist in the existence of a normative fact. Notably R can be rewritten as $(\neg P \neg p)$, or that ‘necessarily, it is not permitted that normative propositions do not raise a claim to correctness’. This says that a (normative) fact is valid in all possible worlds⁵¹. The knowledge of the

48 Lowe, *The Possibility*, 16.

49 Lowe, *ibid.* 12, 15.

50 See the analysis in Ch IV.

51 This could be taken to signify a *normative necessity*, a term used often by Alexy to the utter astonishment of Bulygin (see *ibid.* 136). Bulygin remarks that something’s being normatively necessary (as meaning obligatory) does not really make sense, since if something is necessarily true in all possible

(normative) fact ‘that normative propositions ought to raise a claim to correctness’ is a *posteriori* knowledge that is connected with the act of uttering normative propositions in general. But as already stated, the factual ground of metaphysical necessity, involves a *posteriori* as well as a *priori* elements. If the rule R is, in a sketchy way, taken to constitute a *posteriori* knowledge of some state of affairs, there must be also some knowledge involved which is a *priori*; this will refer to the metaphysical principles or categories which make the knowledge of rule R possible. Before stating those principles, I would like to suggest a further way of rephrasing rule R by substituting the term ‘claim to correctness’ with the expression ‘admit of evaluation as being right/wrong’. This could be further rephrased as ‘admit of practical/moral evaluation’. According to this alternative, rule R will say: ‘it is required that all legal propositions admit of practical/moral evaluation’; coupled with the modality of necessity the same rule will amount to the claim: ‘necessarily, it is required that legal propositions admit of practical/moral evaluation’ or (Op), or even: ‘necessarily, it is not permitted that legal rules do not admit of practical/moral evaluation’. The aim of this substitution is to facilitate an understanding of the metaphysical principle that makes the knowledge of the normative fact R possible. This principle will be, indeed, related to the meaning of the concept ‘correctness’ in a way that the latter will be equivalent to the expression ‘morally evaluable’ or ‘morally criticisable’ (to that extent, I take here the freedom to anticipate the relation by employing already the equivalent expressions). Apparently, ‘correctness’, or any other equivalent expression in the context of agency and action, is rendered possible or intelligible only against the background of the category of autonomy (which can be represented through something like what I previously called a Norm of Autonomy (NoA)). This explication rests on the thought that the things we do, our actions, and the standards we apply to them, can admit of evaluation (right/wrong) only if we think of ourselves as autonomous agents. Furthermore, on a more elementary level, the very inter-

worlds it does not make sense to make it obligatory (Bulygin, *ibid.* 136). I am inclined to believe that this remark is beside the point on the following general reasons: the modal operator O is anyway perfectly conceivable as meaning ‘morally or normatively necessary’ (Cf. with Rod Girle, *Modal Logics and Philosophy* (Teddington: Acumen, 2000), 175); what is implied in this case is that an action-guiding norm prescribes a course of conduct as being obligatory *universally* – hence, in all possible worlds. Clearly the point of normative necessity is not a point about truth. It is a point about autonomy. In other words normative necessity refers to what is necessary from the point of view of autonomy, or morality; a rule of the form ‘close the door or leave it open’, as in Bulygin’s example, is not expressing any form of normative necessity because it is morally insignificant. An alternative way to capture ‘normative necessity’ is the one employed here, when we represent norms as facts. In this case the necessity operator appears to be postulating ontological necessity, hence to be about truth. However, as it is going to be argued, this picture is possible only against the background of the metaphysi-

est about whether our actions or the norms we abide by are right or wrong, is intelligible only if we presuppose the concept of autonomy/freedom.

If this explication is sound, then every normative claim or proposition, etc., which depicts a valid norm, as explained earlier on⁵², will be raising a claim to correctness as postulated by rule R in a necessary way; hence: 'something will be a norm if and only if it raises a claim to correctness'; Thus, on the level of the conceptual necessity, the claim: 'it cannot be true both that something is a norm and that it does not raise a claim to correctness' will be necessarily true, as Alexy seems to imply. Furthermore, as soon as correctness is with metaphysical necessity part of the concept 'rule' or 'norm', autonomy becomes likewise part thereof. At this point it is enough to understand the connection between autonomy and the concept 'norm'/'rule', as involving a *dependence relationship*⁵³ between the meaning of autonomy and the meaning of every possible actual norm. Besides, the dependence relation will be sufficient in supporting the thesis that every normative entity will necessarily be an instance of autonomy: normative propositions whose meaning is an instance of the meaning of autonomy will depict abstract normative objects that can be thought as constituting tokens of the principle or Norm of Autonomy (NoA). Demarcated in this way, the dependence relation satisfies the requirement of a rational explanation of human behaviour within the limits of the 'semantics-exhausts-ontology' thesis.

This conclusion does not vary considerably from the results of discourse-theory. There the claim of correctness, along with a series of other transcendental-pragmatic rules, are conjointly taken to ground a norm or principle about the universalisation of normative propositions, as the transcendental basic norm of communication (concerning both moral and non-moral contexts)⁵⁴. For reasons that are going to be explained in the last chapter, I prefer to locate the metaphysical bedrock of normative or practical knowledge on the level of autonomy rather than on that of universalisation. In any case, the point is that autonomy or universalisation can be thought as constituting *a priori* metaphysical principles that delimit the possibility of practical knowledge. These principles put together the metaphysical or *a priori* background against which experience determines what is 'normatively' actual or

cal necessity of a norm introducing autonomy.

52 Vide chapters III and IV, *supra*.

53 Clearly the nature of the dependence relationship will be in need of painstaking specification, which, however, escapes the scope of the present project.

54 For the content of the universalisation principle (<U>) in theoretical discourses as well as the form it takes in practical discourses, the discourse principle (<D>), vide Habermas, 'Moralbewußtsein und kommunikatives Handeln', 130-134; idem 'Diskursethik-Notizen', 102n.

existing. On such an understanding the principle/norm of autonomy will constitute something like a Kantian *a priori synthetic judgement*. As such it will still be depicting a normative abstract object which, however, will not be available to experience, but will be uncovered via transcendental reasoning.

This method of specifying the metaphysical groundwork of practical knowledge, might create some confusion concerning the status of the pragmatic rules that are grounded through transcendental argument, as in the case of the rule containing the claim to correctness. The proposition depicting that rule, it was argued, is true/valid with metaphysical necessity in the same way that the claim 'water is H₂O' is. Now, what one might want to object to this picture is that, whereas the necessity involved in 'water is H₂O' is knowable *a posteriori* (that is through experience), in virtue of the nature of water, this cannot be the case with the proposition containing the claim to correctness. The reason is that in the case of the proposition that depicts rule R, there is nothing there for experience to discover; hence, in the best of cases, the rule can be knowable only *a priori*. This objection need not worry us. Arguably, the whole point of metaphysical argument is the idea that what is knowable can only be determined after the metaphysical delimitation of a domain of knowledge. Hence, if there are *a priori* principles that allow for (practical) knowledge of the rule R (e.g. the claim to correctness), then experience can discover such a rule. However, if this is too strained a picture of experiential knowledge, there is still another way of explicating the metaphysical necessity implied by our transcendental argument; a way that demarcates more accurately the line between what is knowable *a priori* and what *a posteriori*.

(ii) Instead of taking the necessity entailed by the transcendental argument to refer to a normative fact (the rule R), we can take it to simply refer to the fact that 'legal propositions raise a claim to correctness'. This can be thought as being comparable to the fact depicted in the proposition 'water is H₂O'. At the same time, the necessity connected with the proposition 'all legal propositions raise a claim to correctness' is a metaphysical necessity. This necessity is knowable through a combination of *a priori* and *a posteriori* elements. As to the latter there shouldn't be much disagreement: the actuality of the fact that legal propositions raise a claim to correctness is available to experience. However, there must be some principles that render possible the actuality determined by experience. These principles are knowable *a priori*. Which are those principles? In this case, apart from the principle of autonomy (NoA), one will probably need to include in the lot of the metaphysical principles the rule for correctness, as well as any other pragmatic rule that can be grounded on the basis of performative contradictions. Again here things are not very different from the

findings of discourse-theory. In fact they might be even closer to discourse-theory than the assumptions of the first reconstruction; not the least so because discourse-theory understands the pragmatic rules of communication and the universalisation principle as being *a priori* knowable norms. What was said before for the connection between the concept of autonomy and that of correctness applies *mutatis mutandis* also here. A considerable difference with the first strategy is that here the amount of *a priori* knowledge increases considerably: not only the principle of autonomy but also the pragmatic rules are *a priori* knowable. Thus, the pragmatic rules are conceived as constituting *a priori* synthetic judgements along with the principle/norm of autonomy (NoA).

Even on this reconstruction, the claim to correctness will be a necessary characteristic of norms or normative sentences. Hence the proposition 'it is not the case both that something is a norm and that it is not raising a claim to correctness' will be true with conceptual necessity. Once the necessity of the claim to correctness is at play, the meaning of correctness will 'pull' the principle or the norm of autonomy into the picture. Thus the meaning of every normative claim will be dependent on the meaning of autonomy. Since ontology is exhausted in meanings, any norm or normative claim will ontologically be a token of NoA.

CORRECTNESS AND AUTONOMY

In all, the issue of correctness is somehow an issue about autonomy. Once it is shown, through metaphysical argument, that correctness is a necessary characteristic of (legal) norms, it becomes true that autonomy is also a necessary characteristic of (legal) norms. Therefore a transcendental argument which generates the necessity of the fact that normative propositions or statements raise a claim to correctness, will also generate the necessity of the existence of the (normative) fact that a norm or principle of autonomy exists in an objective way. In short, a transcendental argument like that will demonstrate the necessity of the fact that normative propositions 'raise a claim to be realising autonomy' or, in other words, that they presuppose the existence of autonomy. Perhaps this last conclusion will require, outside of the transcendental deduction, a further premiss that argues that 'autonomy' is built into the notion of correctness, at least in the context of action. Such an argument could have the flavour of an anti-reductionist argument (i.e. an argument to the effect that correctness cannot be taken to be more elementary than autonomy. Or to the effect that correctness can only be 'autonomous correctness').

Departing slightly from the discourse-theoretical architecture of transcendental arguments and the way in which Alexy employs them in the area of law, let me attempt an expanded form of transcendental deduction⁵⁵. In doing so I will try to incorporate some of the insights revealed in the course of the discussion in the previous sections of this chapter. The argument will contain the following six steps:

(a) we make normative statements or assertions.

This is the usual trivial starting point for any transcendental argument; it simply states a fact that is more or less generally accepted;

(b) normative statements are about (or aim at) the correctness of (tokens of) action.

The second premiss attempts to state an equivalent expression for something's being a normative statement which is trivial and therefore equally indisputable;

(c) if normative statements concern the correctness of action then they raise a claim to be correct standards thereof.

This premiss introduces the claim to correctness. For the purposes of the present reconstruction, this claim can be understood as a fact whose necessity does not involve yet any *a priori* knowledge – insofar it can be compared with the necessity involved in the claim 'water is H₂O'.

(d) if the claim of correctness is raised then we are able to identify objective criteria of correctness.

The fourth premiss says roughly that if we connect the uttering of our normative propositions with a claim to correctness, then it is necessary that we have some ways or methods for identifying objective criteria of correctness for our norms and rules that guide action.

55 My version of the transcendental argument draws some parallels to the Strawsonian argument discussed by Barry Stroud in his 'Transcendental Arguments' in Stroud, *Understanding Human Knowledge* (Oxford: Oxford University Press, 2000), 9-25 (13-16), first published in *The Journal of Philosophy* (1968). A basic difference is, of course, that the argument discussed by Stroud refers merely to the knowledge of the external world, as opposed to practical knowledge.

Even if the necessity implied is a metaphysical necessity, the methods of identification need not be understood in a strong metaphysical way. In a simple way, they could be understood as merely including the standard forms of practical/moral (or even legal) reasoning which constitute, more or less, the structures within which we put forward our normative claims. To that extent the constructivist motive of discourse-theory is preserved, without vesting discursive procedures with constitutive role in the determination of the standards of correctness for our normative propositions/norms.

- (e) if we are able to know (through the pronounced methods) those criteria of correctness, then in many cases we know them.

This premiss actually introduces the *a priori* necessity of the standards of normative correctness: the satisfaction of the methods of normative inquiry, which is a prerequisite of generating practical knowledge, depends on the standards of correctness rather than the other way round. The fact that there are standards of correctness is what makes our methods workable. Thus, the stated knowledge of those criteria has an *a priori* flavour; hence, the last premiss proceeds to state:

- (f) if we know those criteria then there are (exist) objective criteria of correctness for action (and the action-guiding norms we employ).

The fact that there exist objective standards of correctness for our normative propositions is what makes, in the first place, our normative claims, and broader our practice of practical argumentation, intelligible. To that extent the transcendental argument's justificatory effect works from the bottom to the top.

Arguably, the last two premisses establish a transition from the trivial fact that we employ normative propositions in our every day practice to the fact that objective criteria of correctness for action and, further, for the knowledge of action-guiding norms exist. This is so because a norm is permissible if and only if it is in accordance with the standards of correctness of action.⁵⁶ Further, according to what was previously argued, the transcendental argument establishes with metaphysical necessity the truth of the proposition 'there are objective criteria of correctness for action'. In being metaphysical that necessity does not

⁵⁶ To that extent the standards of correctness of action are also the limits for practical knowledge: no rule is eligible for 'discovery' if it is in breach with the standards of correctness.

refer merely to a proposition but also to a state of affairs, or to the existence of normative facts (standards) for the correctness of action and the possibility of practical knowledge. Again, in accordance with what was previously argued regarding metaphysical arguments, the existence of those normative facts is a necessary fact that is knowable *a priori*. These normative standards delimit the metaphysical terrain within which we can ‘discover’ or ground the norms which guide action and agency.

I take those standards to amount to a Norm of Autonomy (alternatively one could accept a combination of the principle of freedom with the principle of equality). To that degree, regardless of how one would like to iterate the normative standards of action and practical knowledge, one would have to organise them around a central principle of autonomy. I take this to be a necessary conclusion in the sense that it is not possible to state any standards for the correctness of action independently of the concept of autonomy. This is the simple idea that *it is not possible to represent the relation between autonomy and normative correctness in a way that the latter will be conceptually prior to the former* (and, hence, independent from it). Let me consider an argument to the contrary with the aim to demonstrate its failure.

Such an argument would probably contain the claim that autonomy entails correctness but not vice-versa; hence that correctness is conceptually prior to autonomy⁵⁷. This would be explained by the assumption that it is possible to conceptualise autonomy as the conjunction of correctness with whatever must be added to correctness to yield autonomy, as in the formula:

$$(\alpha): \text{Autonomy} = \text{Correctness of action} + x.$$

In the place of *x* one would need to substitute some concept that when conjoined with ‘correctness’ would amount to ‘autonomy’. A possible candidate is the expression ‘a series of substantive criteria’. In order to make the case more interesting, we can take those substantive criteria to refer to any possible imaginable morality. However, the circularity of the argument will show that those criteria cannot be conceptualised independently of autonomy. Even so, it is purposeful not to specify, for the moment, those substantive criteria in order to establish that not only they, but also correctness, are not conceptually prior to autonomy.

⁵⁷ The reconstruction of the argument and the method of its refutation is inspired from a discussion of Timothy Williamson in respect to the relation between knowledge and belief, advanced in his *Knowledge and its Limits* (Oxford: Oxford University Press, 2000), 2-5.

Since the conjuncts are conceptually prior to the conjunction and since autonomy entails correctness, it should be trivial that an action Φ is autonomous if and only if (1) Φ is correct, (2) Φ complies to a series of substantive criteria, and (3) if Φ is correct and complies to those criteria, then Φ is autonomous⁵⁸. The force of the equivalence lies in the possibility to conceptualise the factors whose conjunction with correctness is necessary and sufficient for autonomy, independently of autonomy. This is what the conditional endeavours to establish. Were this possible, 'correctness' would be shown to constitute a necessary but insufficient condition for autonomy which, when conjoined with some additional factors (the substantive criteria under x), would produce a non-circular necessary and sufficient condition for autonomy. Then it would follow that 'correctness of action' is a 'neutral' concept that can be conceived independently of 'autonomy'.

Alas, this does not seem to be the case here: the equivalence is incapable of establishing the desired conclusion, owing to the circularity of the conditional employed in order to support the independence of 'correctness': 'autonomy' reappears in (3); hence, it is not possible to conceptualise the factor x independently from 'autonomy'. It follows that a necessary but insufficient condition ('correctness') need not be a conjunct of a non-circular necessary and sufficient condition (the conjunction of 'correctness' with x). To draw an analogy with colour: though being coloured is a necessary condition for being yellow, it is not possible to state a necessary and sufficient condition for being yellow by conjoining 'being coloured' with other properties individuated without reference to yellow⁵⁹. Neither the equation 'yellow = coloured + x ' nor the equation 'autonomy = correctness + x ' need have a non-circular solution.

The circularity of the argument based on the equivalence () shows that not only the criteria for correctness but also correctness itself cannot be captured as being conceptually prior to autonomy. Thus the objection that even if we concede that legal (normative) statements raise a claim to correctness this need not be uniform for every judge or legislator⁶⁰, seems to collapse. Instead, it might be more reasonable to conceptualise correctness of action in terms of autonomy, in the simple sense that the former refers or becomes relevant only in connection to tokens of action that are autonomous (or, to use a more accurate ex-

58 The same conditional can be constructed with minor alterations, if instead of actions we take persons or even norms to be predicated as autonomous.

59 Vide Williamson, *Knowledge and its Limits*, 3.

60 This was Bulygin's second objection against Alexy's the claim to correctness. See Bulygin, *ibid.*, 134.

pression, that are performed by autonomous agents)⁶¹.

QUALIFYING AND CLASSIFYING CONNECTIONS BETWEEN LAW AND PRACTICAL REASON

Explicated as above, the claim to correctness is able to support a robust thesis for the inter-connection of legal with practical reasoning as advanced in Alexy's *Sonderfallthese*. This happens when the necessary connection between the uttering of a legal proposition and the claim to correctness is being recast as signifying a necessary relation between legal norms/claims and a general principle of autonomy. Then the principle of autonomy represents a somewhat *ideal dimension* that generates the criteria for the correctness of all practical norms.

In this context Alexy has suggested⁶² that one should distinguish between two aspects of the claim to correctness: the one of raising the claim and the one of fulfilling it. Further, those two aspects relate in a different way to legal systems taken as a whole and in a different one to individual legal rules. In particular, he argues that the raising of the claim to correctness has a classifying impact on whole legal systems: a legal system that does not raise the claim to correctness (explicitly or implicitly) cannot be classified as being legal. Conversely, if a legal system raises the claim but does not live up to it, then it is a legal system, however a faulty one. In this second respect, i.e. of fulfilment, the claim to correctness has a qualifying effect. In contrast, the claim to correctness can only have a qualifying impact on individual norms. The reason is that any norm that belongs to a legal system is anyway, from a classificatory point of view, a legal norm⁶³. Hence, the only effect that the claim, both in its raising and fulfilment dimensions, can have on an individual norm is of a qualifying character. Additionally, Alexy takes the qualifying impact of the fulfilment of the claim to involve some form of necessity both in the case of legal systems and that of individual norms; in other words he holds that it is necessarily true that legal systems/norms that do not raise the claim to correctness are faulty.

Bulygin seems to feel uncomfortable with the concept of necessary qualifying con-

61 The notion of the autonomous agent or person will reappear in the last chapter in an effort to group together the transcendental pragmatic norms that govern normative meaning.

62 For the following distinctions, see briefly, Alexy, 'On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique', in *Ratio Juris*, 13 (2000), 138-147.

63 Alexy seems to be very sceptical in accepting the contrary, cf. *ibid*.

nections⁶⁴. He directs his criticism at two points: first, he remarks that if the claim to correctness has merely a qualifying effect in regard to legal norms, then it is implied that there are things that can be classified as legal norms and yet not raise the claim to correctness. In which case, raising the claim would not be a necessary but merely a contingent feature of legal norms. The second point of the criticism refers to the fact that it is not possible for qualifying connections to be necessary in the first place. The argument here is that ‘fulfilling the claim to correctness’ cannot be taken to be a defining or necessary feature of ‘legal systems/norms’ but merely of ‘faulty legal systems/norms’, and hence to be trivial.

Against those allegations I am going to corroborate Alexy’s defence⁶⁵ of the claim to correctness. In doing so I will suggest a few modifications in Alexy’s understanding of the classifying and qualifying effects of that claim in relation to whole legal systems and individual legal norms:

(i) First, there is no reason for treating asymmetrically legal systems and legal norms in respect to their raising the claim to correctness. Our transcendental argument has argued that it is a necessary fact that normative propositions raise the claim for rightness, and that, further, this is a metaphysical necessity which is knowable *a posteriori*. This entails the truth of the proposition ‘something is a legal norm if and only if it raises a claim for rightness’. According to the necessity connected to the claim to correctness, its being raised is unconditional and can not be compromised according to whether one actually (i.e. explicitly) raises the claim or not⁶⁶. The raising of the claim is an objective feature of every legal and broader practical norm⁶⁷.

(ii) Clearly, the claim to correctness is a necessary objective feature of both legal systems and individual norms. Being thus necessary and objective it is not possible that either a system as a whole or an individual norm do not raise it. Furthermore, it is not possible to conceive something as being a legal system or norm prior to deciding whether it raises the claim or not. To that extent it is not possible to imagine either a legal system that does not raise the claim (and hence is not a legal system) or an individual norm which does

64 Vide Bulygin, *ibid.*.

65 Vide Alexy, ‘On Necessary Relations’, 167-183. Idem, *Begriff*, 64-136; idem, ‘Bulygin’s Kritik des Richtigkeitsarguments’, in E. G. Valdes *et al.* (ed.), *Normative Systems in Legal and Moral Theory. Festschrift fuer Carlos E. Alchourron and Eugenio Bulygin* (Berlin: Duncker & Humblot, 1997), 235-250; idem, ‘Bulygin’s Critique’ (fn. 61).

66 Vide Alexy, ‘The Special Case Thesis’, 382. Also G. Pavlakos, ‘The Special Case Thesis. An Assessment of R. Alexy’s Discourse-theory of Law’, *Ratio Juris*, 11 (1998), 126-154 (148, 151n.).

67 Alexy tries to capture this objectivity by introducing a distinction between the claimant’s subjective intention and an objective or official dimension of the claim to correctness. vide his ‘Bulygin’s Cri-

not raise the claim (and is merely faulty). Even if legislators, bodies, or judges omit or even explicitly deny the claim, the objective dimension of the claim cannot be suppressed. What happens in those cases, and especially in the case of the explicit denial, is that one fails to comply with the demands of the claim rather than avoiding the claim altogether. This is precisely the power of the claim: it is not possible to dispense with it; it will always be posing its substantive demands on the content of normative systems or individual norms.

(iii) In the face of the fact that it is anyway impossible to imagine an absence of the claim altogether, the only interesting connection that the claim can have with individual norms or systems is what Alexy calls a *qualifying connection*. Alexy, in introducing the connection between individual norms and the claim to correctness, says⁶⁸ that it can be only a qualifying connection, since legal norms are already norms within the framework of a legal system. This claim will be contradictory unless it is taken to mean that the fact of a norm's raising the claim to correctness is somehow secured by their belonging in the system. Hence the only thing remaining to be examined is if they live up to the claim. This can be right, however, under one condition: the claim's being raised is guaranteed not by the legal system but by the standards of correctness which include a norm of autonomy. The existence of those standards (as normative facts) constitutes a metaphysical necessity which is knowable *a priori*, as the transcendental reasoning revealed. Now, if one moves a level higher, a whole legal system will, by the same token, always be a legal system in virtue of the existence of the aforementioned substantive standards. It is a different thing, however, if it is going to be a correct or a wrong legal system. Consequently even in the case of whole legal systems the only question that remains open is whether they are correct or wrong.

(iv) To further elucidate this view let me use some findings from the discussion in the previous chapters, and suggest something like the following network of normative entities: The claim to correctness is connected to a series of objective standards for action, whose existence constitutes an *a priori* knowable metaphysical necessity. Once those standards exist, every normative proposition will necessarily raise a claim to be correct according to those standards, or to be abiding by them. This correctness will consist in the proposition's depicting a valid normative object. To that extent it is important to keep the distinction between normative propositions and the norms they depict⁶⁹. Then the claim to correct-

tique', 145 (fn. 61).

68 Cf. with fn. 38.

69 In a non-representationalist theory of content it is still possible to distinguish between the environment and our propositions about it. Even if the environment is revealed within the semantic structures

ness will be raised by normative propositions, whereas correctness will be a feature of valid normative objects (norms). Valid are those norms that meet the standards of correctness. As argued before, those standards are, in one way or another, dictated by NoA. Hence correct are those norms that realise autonomy. This realisation practically means that a correct norm will be a token of NoA, in the sense that it is a regulation of a concrete case within the boundaries of NoA. To use another formulation, every particular norm will be a token of NoA concerning a concrete case. What emerges is something like the following picture: the standards for correctness and NoA are normative objects that are necessarily valid and knowable *a priori*. All other norms are tokens of those standards/autonomy. As a result, what is possible to be depicted by normative claims/propositions is delimited by the standards of correctness plus autonomy. Those standards plus autonomy delimit ontologically the domain of valid norms. Normative propositions and other claims necessarily aim at valid normative entities because they necessarily raise a claim to correctness. They fulfil the claim if they depict an existing or valid normative object; they fail it if they do not. Further, they depict a valid norm if their meaning is compatible with the meaning of the norm of autonomy (or, more accurately, the proposition that thematises the norm of autonomy); they fail to depict a valid norm if their meaning does not abide by the meaning of the norm of autonomy⁷⁰.

(v) The meaning of NoA can be taken to express the content of a (*minimal*) *morality* shared by anyone who advances legal claims. To that extent, one does not need to actually share or agree with the content of autonomy. As in the case of the claim to correctness, autonomy is a necessary objective condition for the validity of our normative propositions. Intertwined in this manner with autonomy, the claim to correctness can be reconstructed as prescribing that all legal propositions/claims ought to be in accordance with what autonomy decrees (the meaning of NoA). This can be further analysed as saying that all normative

of language, it is not the case that it is *constituted* through them. The main assumption of such a theory is that content is shaped by the environment in an immediate way, without the intervention of any sort of mental interface.

70 A last issue might arise in connection to the relation of the claim to correctness with whole legal systems. Is it intelligible to distinguish between a legal system on the level of legal propositions to which the claim for correctness will refer, and a legal system on the level of legal norms to which the fulfilment of the claim will refer, as we did in the case of individual norms? Arguably this would be a rather confusing distinction. In order to keep things simpler here, it might be purposeful to approach legal systems through the individual norms that constitute the system, and examine the different possibilities in the way explained. A legal system would cease to exist if the majority of its norms are invalid or non-existent. 'Majority' will be defined not on a quantitative but also on a qualitative basis: namely, if some norms of the system directly cancel autonomy or fail to respect those constitutional

propositions should depict a valid norm (that is a token of NoA). Conceived in that manner, the meaning of autonomy will derive from all the norms that we know to be valid at a given time. By being valid tokens of a general norm of autonomy, those special valid norms will have a 'saying' in shaping the meaning of 'autonomy'.

(vi) To summarise: legal propositions, claims, or statements necessarily raise the claim to correctness. They do so because they are, as it were, empowered by a series of necessary standards of correctness plus the norm of autonomy, that are knowable *a priori*. In raising the claim for correctness, legal propositions depict or aim at normative objects (norms). Those normative objects can be correct or faulty. They are correct if they abide by the standards of correctness (and, insofar, are tokens of NoA). They are faulty if they do not comply with the standards of correctness/autonomy. Correctness and wrongness are thus substantive issues that are measured against the content of autonomy. Furthermore, since the norm of autonomy is valid with metaphysical necessity, any norm that contravenes it, is necessarily faulty. Admittedly, to say that faultiness is a necessary feature of faulty legal norms is to concede a trivial tautology. What is very important, however, is that we can know to which cases the tautology applies because we know the criteria according to which norms are faulty. To know that is, clearly, anything but 'trivial'.⁷¹

On the face of the above remarks, there does not seem to be enough room for explicating the criteria of correctness as being other than *objective action-guiding norms*. In what follows, I am going to discuss briefly the lines along which discourse-theory (and in particular the Habermasian version) opts for a procedural understanding of the pragmatic pre-suppositions of communication. It will be then argued that, to a large extent, the preoccupation with a procedural paradigm of knowledge and rationality – that is so typical of discourse-theory – emanates from a problematic (representationalist) understanding of the relations between the mind and the environment. The ground for this understanding will be located in an erroneous interpretation of Wittgenstein's *private language argument*. The conclusion will be, roughly, that the rationale of the Wittgensteinian argument does not let a representationalist reading go through. Once, however, the discourse-theoretical picture of the mind-world relations collapses, so does the need for a strict proceduralist explication of the transcendental pragmatic norms of communication.

Finally, the last chapter will attempt to accommodate the discourse-theoretical in-

rights that actually guarantee autonomy, then the system will be invalid altogether in its entirety.

71 As Bulygin tenders, *ibid.*.

sights into a philosophical framework that appears to respect the point of the Wittgensteinian argument. This framework will be in accordance with the previous discussion of anti-representationalism while, at the same time, it will point towards a substantive conception of the criteria of practical correctness, as constituting *objective action-guiding norms*.

SUBSTANTIVE AND PROCEDURAL UNDERSTANDING OF THE STANDARDS OF CORRECTNESS

The discussion of the pragmatic-normative presuppositions of normative meaning has by now reached an understanding thereof as consisting in a series of norms that exist with metaphysical necessity and that are knowable *a priori*. Those norms provide for the conditions under which our normative claims are intelligible (necessity of the claim for correctness), as well as the substantive criteria under which action-guiding norms are correct/wrong or valid/invalid (necessity of the qualifying effect). Connectedly, the transcendental-pragmatic norms do not themselves fall under the requirements of the binary code correct/wrong or valid/invalid. Rather, their validity is a precondition for constituting the distinction right/wrong or valid/invalid in respect to every other action-guiding norm.

The transcendental-pragmatic norms are abstract normative objects. For such an understanding one need not presuppose a demanding ontology. That possibility is, rather, available through nominalisations of certain normative sentences, as it was demonstrated in chapter IV. As such, the transcendental pragmatic norms constitute part of the environment. Their 'objecthood' guarantees our ability to distinguish between 'internal' or mind-dependent and 'external' or mind-independent states of affairs and objects (chapter III).

An ontological explication of action-guiding norms that relies upon semantics, amounts to placing practical (i.e. action-guiding) meaning in the centre of the ontological enterprise. The transcendental-pragmatic norms are specified as the necessary condition for the possibility of the meaning of normative propositions and, hence, for the existence of the corresponding norms. Our ability to depict norms by constructing semantic structures (through employing normative propositions) is constrained by the meaning of the transcendental norms. But the meaning of those necessary and *a priori* knowable norms gives us sufficient access to their ontology. Consequently, it is the case that both on the level of the transcendental norms as well as on that of any *a posteriori* knowable action-guiding norm, practical meaning becomes constitutive for the ontology of norms. Hence, transcendental as well as simple action-guiding norms are ontologically on a par: they are action-guiding

normative abstract objects, their only difference lying in the fact that the former are knowable *a priori* whereas the latter only *a posteriori*⁷². To that degree, the objecthood of practical norms is intertwined with their practical or action-guiding meaning to the effect that those two aspects presuppose each other.

In conjunction with those remarks, an analysis of the transcendental pragmatic rules that support practical meaning and validate action-guiding norms, needs to be aware of their double nature: first that they are *mind-independent, abstract normative objects*. Second that they are *normative objects concerning the regulation of human agency*, because their meaning is practical (i.e. signifies instances of autonomy).

I want to suggest that, in conflict with those requirements, the two most important theoretical programs that undertake the task of exploring the transcendental normative presuppositions of practical meaning – Apel's Transcendental-Pragmatics and Habermas' Universal-Pragmatics – fail to live up to the demands that such an enterprise poses⁷³. In explicating the transcendental pragmatic norms as norms that regulate merely speech, the two philosophical programmes, fail to provide for some categorical reasons or criteria, on the basis of which practical discourses would be able to ground more specific action-guiding norms.

A conception of discourse-rules as rules for speech, results into an anti-realist, in the sense of mind-immanent, explication of the norms of morality and law, according to which there is no way of distinguishing between subjective understandings of rules and some mind-independent conception thereof⁷⁴, i.e. as constituting objective parts of the environment⁷⁵. Anti-realism on the ontological level results in a failure to appreciate practical norms as being objective standards for action: if the transcendental norms are binding for speech but not for action, then there are no action-guiding standards that could constrain

72 Furthermore, both are knowable only within the context of social practices.

73 Having said that, it is fair to mention that K.-O. Apel's Transcendental-Pragmatics strives to make room for a substantive ethical *Grundnorm* as a necessary presupposition of practical discourses (Cf. Apel 'Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik', 415-423). However the postulation of such a norm strikes one more as an assertive claim rather than a logical consequence of the theoretical scaffolding of Transcendental-Pragmatics, since Apel, as much as Habermas, accepts a dualist picture of the mind-environment relations in which the discourse-rules remain rules strictly for the speech.

74 This is particularly acute on the face of discourse-theory's dualist understanding of the mind-world relations: if conceptual content is not directly 'shaped' through the environment, then all normative concepts that are conceived as norms for the speech face the danger of being radically *idiolectic* or *private* and hence relative in value.

75 Though 'environment' here can not be taken to refer to the natural environment, one can still allude to the use of the term in connection to rules, provided it is taken as encompassing the products of

discursive outcomes. Hence the content of the action-guiding norms that are generated through practical discourses is relative to the various contingent factors that might affect the discursive procedure. However, if the justificatory power of discourses is rendered as relative as that, then their *raison d'être* seems to wither away.

But is the proceduralist picture compulsory? Rather not: it seems that there is a series of good reasons that speak against it and the attendant understanding of discourse rules as rules for speech.

Against Habermas' Proceduralism

In this section I will attempt to demonstrate that the premisses and broadly the theoretical background of discourse-theory does not warrant the proceduralist explication of the discourse rules that is advocated by Discourse-theory, in particular in its Habermasian version. Let me start with a clarification concerning the content of the term 'pragmatic' that is attributed to the discourse rules which are taken to constitute the transcendental presuppositions of speech. Arguably, the discourse rules are pragmatic only to the extent that they derive from *action-related contexts* and not because they are ephemeral or temporally limited. The normative aspect of these criteria demands rather that they be equipped with a more permanent character, a sort of semantic stability. In this sense, the term 'pragmatic' refers merely to normative standards which can be derived from the context of a human action or a chain of human actions (or a practice). At the same moment, though, these standards determine the *meaning* of all normative utterances, a fact which speaks for their possessing some sort of stability. This stability does not occur either on the basis of semantic or syntactic forms, or on the basis of any other, as it were, 'empowering' norms that are anterior to the pragmatic norms, but emerges from the reflection on the fact that certain pragmatic norms are necessary presuppositions for certain forms of human acting or practice. This conception of the pragmatic character of norms seems to be the one informing the philosophical programme of the speech act theory which lies at the bottom of Universal Pragmatics, or the linguistic-philosophical part of Discourse-theory.

The basic intuition of the speech act theory is the interconnection between language and human action/agency. The term 'speech act' reflects precisely the fact that the semantic level of a language is constituted through the valid acts of use of this language. Hence, in a way, the actuality from which logicians abstract whenever they speak about the sense of a

social practices and, broader, of intellectual activity.

term or a sentence is, at the end of the day, constituted by our deeds and linguistic practices⁷⁶. The validity of the speech acts depends further upon norms that derive from human action and, for this reason, have to be understood as genuine action-guiding norms. Their pragmatic character is exhausted in the fact that they are derived in a pragmatic way, i.e. in relation to a practice and, at the same time, as presupposition of this practice. Consequently, if one adopts the speech act theory, one should also endorse its normative implications. This is of great importance in the case of practical utterances, whose normative presuppositions have the character of moral action-guiding norms.

In contrast, Habermas' understanding of the pragmatic universals of the speech seems to be rather formal: according to his account, the validity-claims that illocutions entail have an impact merely upon the external form of utterances. They behave like coherence-criteria, by which every speaker has to abide, provided they wish to express themselves appropriately. In this account the pragmatic norms are somehow reduced to a kind of code, which aims to guarantee meaning and coherence among speakers. This yields a picture in which the substantive dimension of the validity-claims is obliterated. This fact is untenable in the case of the claim for correctness. Furthermore, the dependence of semantic properties on action-related normative contents is one of the main intuitions of the speech acts theory. Habermas' refusal to endorse these views is allegedly justified by the fact that he wants by all means to avoid a retreat towards 'occult' moral entities. But is it really tenable to believe that the only possible way to derive the normative co-ordinates of human communication, is by endorsing a kind of occult metaphysical realism? Rather not; at least not since the linguistic turn. The normative presuppositions of human communication that can be grounded through reflection upon our action are ontologically rather modest and cannot be compared with any kind of 'material' moral entities. Their modesty results from the fact that they are grounded within and on the basis of our practice (on this side of the world!), while it is possible to ontologically depict them within linguistic structures, as the semantics-exhausts-ontology thesis has demonstrated⁷⁷. At the same time, however, they present a sufficient argumentative/justifying force, since they are shown, through reflection upon our practice, to constitute the normative presuppositions of this practice. There is, namely, no higher normative level that could provide us with stronger evidence!

Habermas' reluctance to accept the normative presuppositions of speech in their full

76 McCulloch *The Mind and its World* (London: Routledge, 1995), 95.

77 Vide *supra*, chapters II, III, IV.

range leaves the whole project of the universal-pragmatics hanging in the air. It is not enough to acknowledge the possibility of universally valid pragmatic presuppositions of speech; one should further know on what grounds their universality is possible. Habermas tries to fill this gap by employing the concept of the *argumentation-community* [*Argumentationsgemeinschaft*].

The Argumentation-Community

If the pragmatic universals of the speech are merely rules for an argumentation or a discourse, they cannot sufficiently ground the necessity of a discourse. The notion of the discourse is, in this case, prior to those rules and its justification has to be derived from another concept. This purpose is served by the argumentation-community. The main features of this concept can be summarised as follows:

The argumentation-community incorporates the universalization-principle (U) in relation to the validity of utterances⁷⁸. Utterances can be rendered true or correct only within the framework of an argumentation-community: The transcendental program of universal-pragmatics, which was to unveil the general (normative) presuppositions of speech, is here totally modified or even abandoned; what is rendered transcendently valid are not norms but the universalization-principle in the form of the argumentation-community! It is, however, absurd to render a formal/procedural rule like (U) transcendently valid. The validity of (U) needs to be supported by substantive reasons. Habermas himself seems to understand the problem when he endeavours to derive (U) from the pragmatic rules for argumentation⁷⁹. In this case, however, the argumentation-rules have to be understood as substantive norms, or else the 'backing' enterprise must fail. Substantive reasons do not derive from formal speech rules.

The argumentation-community is further related to a *consensus theory* of practical rightness and theoretical truth⁸⁰. The idea of a consensus-based theory of truth and rightness is totally consistent with the universalization principle which constitutes the core of the argumentation-community. According to the consensus theory true/right are those proposi-

78 Here is obvious the influence of the Kantian Categorical Imperative, as well as of other contemporary moral theories (Hare, Baier); see also Leist, 'Diesseits der 'Transzendentalpragmatik': Gibt es sprachpragmatische Argumente für Moral?', *Zeitschrift für philosophische Forschung*, 43 (1989), 303n. (306).

79 Habermas, 'Diskursethik – Notizen', 97n.; idem *Faktizität*, 138.

80 For the content and the main ideas of a consensus theory of truth and rightness vide the body of Habermas' main work as indicated in fn. 1, *supra*.

tions which have concentrated the consent of all participants within an argumentation. Habermas further distinguishes between a false and a true, in the sense of justified, consensus⁸¹. The criterion for a justified consensus should not require anew a consensus, but has to be traced back to an *ideal speech-situation* [*ideale Sprechsituation*]. The ideal speech-situation is conceived as a regulative ideal as opposed to the real speech-situation [*reale Sprechsituation*]. This practically means that among all action-guiding norms (moral/legal norms) that have met an actual consensus within a real discourse, only those are assumed to be justified which additionally would have met the consent of all participants of an ideal discourse⁸².

The idea of an argumentation-community is grounded (transcendentally) on the philosophical thesis of the impossibility of a private language, which Ludwig Wittgenstein formulated as the Private Language Argument in his *Philosophical Investigations*; here is the *locus classicus*:

And hence also 'obeying a rule' is a practice. And to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it⁸³.

The necessity of the argumentation-community derives allegedly from this thesis. If one cannot privately follow a rule, which is the same as saying: if one cannot define privately meanings in a language, then we need a community in order to make communication and meaning possible. The necessity of the community indicates further the communicative character of language, as well as its immanent intersubjectivity. On these grounds some expectations of reciprocal recognition and appropriate behaviour are ascribed to the members of the argumentation-community⁸⁴.

The above conception of the argumentation-community demonstrates some of the seminal problems and inconsistencies of discourse-theory as a theory of procedural rightness of practical norms. These problems originate mainly from a superficial or erroneous interpretation of the private language argument, as will be demonstrated in the last chapter.

81 For a comprehensive presentation of consensus-theory, see Keuth 1993, 112n. (132, 151n., 154n.).

82 The philosophical justification for the requirement of an ideal speech-situation is derived from the need to explicate the concept of truth without recurring to 'an ontological relation between the language and the world'. Insofar, Habermas takes the idea of the ideal speech-situation to share the intuitions of the pragmatic philosophy of C. S. Peirce. Vide Habermas, *Faktizität*, 28-32.

83 Vide, L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1973), §202.

84 Keuth 1993, 57-62.

For the moment, we will just focus on the weaknesses of the concept of the argumentation-community without questioning its corresponding interpretation of the private language argument.

The argumentation-community, whose necessity is assumed on the ground of the private language argument, generates the transcendental conditions of any form of argumentation. It incorporates, as it were, the normative requirements for any possible form of human communication and has a priority over all other normative presuppositions of the speech. In other words: all those elements which universal-pragmatics bring forth as the general normative co-ordinates of speech, are in a sense subordinated to the presuppositions of the argumentation-community. On the other hand, the argumentation-community is something like the epitome of the universalization principle. This fact alone makes the necessity of the community dependent on a series of substantive reasons: i.e. the perspective of universalization requires the existence of certain common features among the members of the argumentation-community. This line of reasoning can also be reconstructed under the angle of the private language argument: Why is it impossible for one to fix privately meanings in a language, hence to speak privately? One possible answer could be formulated on the hypothesis that we all are, with an existential necessity, members of a transcendental community that has always to be presupposed in any form of communication. I am not going to pursue further this occult line of argument. Instead, I will focus on a more plausible alternative which concentrates on the fact that speaking as acting and acting as speaking make implicitly some normative presuppositions which can ground the necessity of the argumentation- or discourse-community. According to this view, the concept of the community follows after and on the ground of the normative presuppositions of the speech as the most elementary form of human action. Consequently, the argumentation-community cannot stand on its own but has to be understood as a concept in need of justification [*begründungsbedürftiger Begriff*] through substantive normative reasons. The suggested line of argument aims to intensify the problematic aspects of the relation between a discourse-community and the general normative presuppositions of the speech. Habermas' interpretation of the private language argument more or less says: 'we need to presuppose an argumentation-community if it is for the universal-pragmatics to be possible and for the discourse to be postulated'. My questioning shifts the main emphasis: 'On which conditions can we be members of a communication-community, and how can this community be defined, hence justified?' These conditions and further the grounding of the community are substantive questions that can be answered only on the ground of the pragmatic normative

presuppositions of communication. The latter are further to be understood as comprehensive action-guiding normative objects which constitute instances of a Norm of Freedom or Autonomy and, further, refer to a certain conception of persons. The point, namely, I want to make here is that the argumentation-community and a consensus theory of truth/rightness can only be grounded on the basis of the normative presuppositions of speech and not vice-versa. It is not the case that the presuppositions of communication must be justified on the ground of an argumentation-community, but rather that the argumentation-community can only be conceptually constituted on the ground of the communication-presuppositions. This generates on the level of the validity of practical norms a couple of important consequences:

- (i) The notion of an ideal argumentation-community seems redundant; the original need for an ideal argumentation-community is the need for a criterion that makes the distinction between a true and a false consensus possible. If, however, the notion of the consensus has to be constructed on the basis of comprehensive norms, then the criteria of a true consensus are already included in the concept of the consensus. In this case, the concept of ideal community is a thought experiment that loses any rationale of existence when deprived of its role as consensus-criterion. The ideal community does not serve any other purpose: the rules of the argumentation [*Argumentationsregeln*], even if they are perceived as pure rules for the speech, are already available within the scope of the actual or real argumentation-community. These rules are in any case grounded on the real argumentative practice; and this practice is the only means through which we can gain an insight into the normative presuppositions of speech. One could name this practice as one likes, and the term ‘real/actual argumentation-community’ [*reale Argumentationsgemeinschaft*] that Habermas uses, is not bad indeed. Anything more than this, though, is superfluous and reveals a misunderstanding of the private language argument.
- (ii) The universalization principle (U) as the validity condition of practical norms, is also grounded on the normative presuppositions of the speech. These presuppositions correspond further to a conception of persons: this conception is underpinned by the idea according to which action-guiding norms should be universalizable precisely because they address moral (i.e. free and equal) persons. Habermas strives, implicitly though, to establish an (indirect) connection between the discourse and the concept of the free and equal person: either by articulating argumentative norms of freedom and equality between the discourse members (which though are strictly conceived as rules for the speech and are therefore too weak to lead to a conception of persons); or by claiming that from all possible action-guiding norms that could be the outcome of a discourse, only the ones concerning freedom and equality can generate the true consensus within a real discourse (without though explaining where these

action-norms owe their magical power!)"⁸⁵.

In all, I have suggested that the way in which Habermas constructs the two, central to the discourse-theory, concepts of universal-pragmatics and the argumentation-community makes them antithetical to each other instead of complementary, as they are alleged to be. The original purpose of universal-pragmatics was to accomplish anew the task of the transcendental grounding of practical/moral norms in an enlightened post-metaphysical way [*nachmetaphysisch*], and in this sense to restore moral cognitivism as a plausible alternative to moral scepticism. This enterprise has been blocked in the process by two counter-forces: the fear of an occult moral realism and the formalism akin to Kantian practical philosophy⁸⁶. These two obstacles generate something like an *epistemological akrasia* within the camp of discourse-theory, which fails to perceive the transcendental-pragmatic rules for communication as action-guiding normative objects. This inability undermines the justifying capacity of universal-pragmatics and subordinates the whole transcendental enterprise to the formal concept of an argumentation-community.

As indicated earlier, much of the reluctance to connect the pragmatic level of discourse with the level of action rests on some problematic assumptions concerning the relations between the mind and the environment. Furthermore those assumptions seem, peculiarly, to derive from a 'representationalist' reading of Wittgenstein's Private Language Argument.

Private language and discourse: preliminary remarks

Evidently, Apel's and Habermas' reluctance to adopt a more realist stance towards the transcendental norms that support practical meaning, stems from something like a dualist under-

85 Analogously vague seems to be the effort to combine a pure procedural discourse model with the concepts of the *discursive impossibility/necessity* and the *discursive possibility* (Alexy, *Theorie*, 256, 415. The discursive impossibility/necessity emerges in the case of a rule that 'excludes people from the discursive will-formation process by conferring on them the legal status of a slave' (ibid. 256). In these cases the transcendental-pragmatic discourse-rules are used as normative premisses from which derives the discursive impossibility, a fact that totally contradicts the character of the discourse-rules as pure rules for the speech.

86 Characteristic are the following passages from Habermas: '...indem sie [die Diskurstheorie] die Sphäre der Sollgeltung von Handlungsnormen herausarbeitet, grenzt die Diskursethik den Bereich des moralisch Gültigen gegenüber dem der kulturellen *Wertinhalte* ab' (Habermas 'Moralbewußtsein und kommunikatives Handeln', 132). This last thesis has as effect that: 'Grundnormen des Rechts und der Moral fallen überhaupt nicht in die Zuständigkeit der Moraltheorie; sie müssen als *Inhalte* betrachtet werden, die der Begründung in praktischen Diskursen bedürfen' (Habermas 'Diskursethik – Notizen', 96).

standing of the relations between the mind (and language) and the environment⁸⁷: under this understanding, the mind and the world are radically separated from each other. Here, attempts to gain knowledge of the environment can be as subjective as those concerning internal states. In contrast to this sceptical picture, the two fathers of discourse-theory take communication via language as offering a possibility to establish something like a communal mind in relation to which it is possible to have objective or shared knowledge. Thus, the conditions for that portion of objective knowledge are upgraded to the conditions of all possible knowledge. The underlying thought seems to run along the following lines: if all we can have objective knowledge about ~~lies~~ on the side of a version of the Internal (communal mind) rather than the External (environment), then the conditions that enable us to do so are to be taken to constitute the conditions of knowledge. Since the notion of the communal mind is constituted on the basis of communication through language, the conditions for knowledge will be the conditions for communication. To that extent, those conditions need to be kept within the boundaries of language, i.e. as conditions of speech. In this way Universal- and Transcendental-Pragmatics end up excluding the environment from their account of both theoretical and practical knowledge. On their conception, true and justified is only what can be validly 'translated' into the schemata of the 'internal' common mind, construed on the basis of communication. In what I am going to argue that is a mistaken interpretation of Wittgenstein's thought, the discourse theorists take their theoretical construction to follow from the discussion of the private language argument.

Clearly, there are innumerable problems concerning the concept of a common mind. Besides, the scepticism that the dualist picture entails for the knowledge of the environment, can very easily be expanded towards undermining knowledge in respect to other minds, including a 'communal' mind⁸⁸. Furthermore, any reading of the Wittgensteinian private language argument as pointing towards such a conception of communal mind and the ensuing anti-realist understanding of knowledge (or of truth and justification) is highly contestable. Be that as it may, discourse-theory is indispensable to the extent that it makes explicit the evaluative side of meaning and content, which play a decisive role in our account of the

87 It should be noted that those premisses are never made explicit by the two main proponents of discourse-theory. However, I take them to depict, more or less, the assumptions on the philosophy of mind that support the program of discourse-theory. For instance, compare with Apel's remarks on the private language argument, when he says that the purpose of this argument is to show that rule-following and thought-formation cannot be performed privately by an individual but have to be performed publicly (*öffentlich*) within a community of speakers; Apel 'Das Apriori der Kommunikations-gemeinschaft', 399-400.

moral or normative environment. This is, in other words, the idea that meaning and, further, content are not independent from the way we communicate and interact with each other, an idea that suggests that interaction and communication are central to an understanding of ontology (the world). Legitimate as this enterprise might be, it raises a question in respect to the asymmetry of the relation between communication and the environment: ‘Why need meaning and content be only about communication and not also about the environment’? To deny the latter would more or less amount to denying that communication and agency are about the world/environment and to affirm that they are radically introspective⁸⁹. The asymmetry seems to be arbitrary unless one can provide for a reason that would explain the advantage of an account from the ‘inside to the outside’.

Notoriously, such a reason could only emanate from the camp of representationalism⁹⁰: the thesis, namely, that we have some privileged access to our internal states which are able to reflect the environment in a mysterious way. To the worry: ‘what if those internal states are just too ‘private’ in order to be able to offer an account shared by everyone’?, discourse-theory’s answer is that we need to make them public to the extent that we can infer the existence of something like common or public internal states (mind). In order to achieve that, discourse-theory resorts to a communicative practice based on the concept of a public language. The role of that language in relation to mental states is not very clear. It seems plausible to suppose that the public language is used as a means of individuating tokens of internal states which - for that reason - become public, as opposed to mental states that are private, owing to their being individuated via sentences of a ‘private’ language, or a language that is not comprehensible by all members of the linguistic community. The picture that emerges from these assumptions is that a public language, in transcending the subjectivity of the individual’s internal devices of content-formation, can function as a means for pointing towards an inter-personal and hence more objective device of representation of the environment. Since direct access to the environment is tied up with the extreme scepticism of a private language, the ‘communal’ device of representation is the means closest to objective knowledge we have. Thus, in a way, discourse-theory seems to present the fol-

88 For a discussion of those points see *infra* chapter VI.

89 Cristina Lafont has recently advanced – from within the camp of discourse-theory – a powerful critique towards this direction, with the aim to highlight potential points of contact between discourse-theory and other philosophical programmes that are explicitly realist (in particular the so-called theories of ‘direct reference’). Vide her *The Linguistic Turn in Hermeneutic Philosophy* (Cam. Mass: MIT Press, 1999), 277-281 and CHs 6 and 7.

90 See *supra*, chapter II and *infra* Ch. VI..

lowing dilemma as unavoidable: either we can have objective knowledge by alluding to public representational states while giving up any hope of having direct access to the environment, or we rely on our direct depicting of the environment which is radically private and leads to extreme scepticism. Either way the environment is not constitutive in shaping our internal mental states. Insofar as discourse-theory takes this conclusion to derive from Wittgenstein's discussion of a private language, the dilemma posed need not be compulsory.

Further objectives

There are very good reasons for arguing that Wittgenstein's discussion of private language aims precisely at the opposite conclusion from what discourse-theory takes it to do, namely at discrediting all forms of representationalism and, further, at restoring the connection between the mind and the environment. This is going to be the topic of the last chapter. At the same time, the discussion will help in recasting the main arguments of discourse-theory to the effect that the enterprise of depicting the pragmatic-normative presuppositions of meaning will be environment-sensitive. In particular, in the area of practical rationality, the environment will consist in the norms of law and morality that are depicted through the every-day communicative practices of any community, plus the necessary transcendental norms that validate those norms of law and morality. As to the issue how normative content is individuated, I am going to stick to the semantics-exhausts-ontology thesis, which seems to agree with how discourse-theory understands the individuation of mental states in general.

The proposed account purports to place anti-representationalism about normative or practical content, within the framework of human practices and modes of communication. *On the one hand*, normative meaning is generated by or within communicative practice. Practice is an ongoing regulated activity that both requires and posits action-guiding standards; hence, to the extent that meaning is sufficient for an ontological underpinning of norms, the ontology of norms presupposes practices of communication. Consequently, communicative practices constitute the environment into which one will have to look, in order to 'discover' norms. *On the other hand*, communicative practice offers the conditions for advancing the transcendental argument concerning the standards of normative/practical correctness. This fact has two aspects: *first*, communication incorporates a self-reflective dimension⁹¹ which offers to its participants the possibility to transcend its contingency and

91 See especially Habermas, 'Erläuterungen zur Diskursethik', *passim*.

reflect upon its necessary normative prerequisites (as prerequisites for normative meaning). *Second*, communication, as an ongoing activity which incorporates substantive action-guiding patterns, offers the raw material from which the transcendental argument derives its *aboutness*: the transcendental standards (discourse-rules) are standards about *the determination of action*; further, the semantic structures of those standards, as before in the case of simple norms, are sufficient in accounting for the ontology of the corresponding (transcendental) norms. Taken together these two aspects signify our ability to depict objective action-guiding standards within our communicative practices. *Hence, even if the transcendental norms rank normatively as being anterior to communicative practice, they can only be conceived from within communicative practice.*

Resting on the anti-representationalist content of the private language argument I will further attempt to paint with a very broad brush a picture of communicative practice, in which the transcendental-pragmatic presuppositions feature as substantive (action-guiding) norms with the result that the Habermasian idea of an argumentation-community loses its normative priority. The substantive character of discourse-rules will be revealed when one pursues further the claim to correctness of normative propositions: this claim raises, as it were, the question about the *moral point of view*, namely the angle under which normative propositions *first* 'claim' to be correct/justified (the claim for correctness), and *second* are considered to be correct/justified (the criteria of correctness)⁹². Then it becomes clear that the moral point of view is dictated by a set of substantive norms which envisage procedural discourses as the best way to justify our every day action-guiding norms (rules of morality and law)⁹³.

In this broad picture two thoughts will be associated with discourse rules as substantive norms: *first*, the thought that they bring into expression the idea of *autonomy*. This thought can be specified in different ways: one is to say that the discourse rules amount to a Norm of Autonomy (NoA); another is to say that they are the inescapable *tokens* of a norm of autonomy; perhaps a more practicable way is to say that in the light of those norms all potential subjects of communication are *constituted as being autonomous persons/agents*.

92 It should be noted here that the quest for justification and the justification criteria cannot be strictly distinguished, since the semantic depth of the word 'justification' already incorporates some qualitative criteria: it is not possible in other words for any 'backing' of normative propositions (for instance the criminal's threat towards his victim) to be considered as justification.

93 This is a broader claim saying that these rules are the epistemic conditions of any knowledge and not only of moral knowledge. See K.-O. Apel, 'Szientistik, Hermeneutik, Ideologiekritik. Entwurf einer Wissenschaftslehre in erkenntnisanthropologischer Sicht', in J.Habermas, D. Henrich and J.

Second, the thought that discourse rules constitute the limit of any procedural discourse and any justification, in the sense that they justify procedural rightness only to the point that it serves the autonomy of persons⁹⁴. Having said this, procedural discourses are, still, the best means among equal and free (i.e. autonomous) moral agents in order for them to settle the norms and principles of their every-day life, as there is no privileged standing point for anyone as far as the quest for rightness is concerned⁹⁵.

Taubes (eds.) *Hermeneutik und Ideologiekritik* (Frankfurt am Main: Suhrkamp, 1971), 7-44.

94 This seems to be the idea behind R. Alexy's conception of discursive necessity and/or impossibility, vide fn. 80, *supra*.

95 It would not be misleading if we draw an analogy between procedural discourse and the democratic principle (the rule of the majority) as the best way among equal free citizens to fix the legal/political framework of their lives in a political community.

CHAPTER VI

PRIVATE LANGUAGE AND COMMUNICATION: MEANING, CONTEXT AND PERSONS

INTRODUCTION

This chapter offers an anti-representationalist reading of Wittgenstein's private language argument along the lines suggested in chapter V. This reading aims to generate the requirements for an account of the normative presuppositions of the meaning of normative sentences and broader propositions, as constituting substantive (action-guiding) norms that are knowable *a priori*. These requirements involve, roughly, two aspects: *First* the need to understand the communicative practices that generate normative meaning/content as instances of interaction between intentional agents and the environment (in other words, as being *world-involving*). *Second* the need to explicate the normative patterns that underlie practices as action-guiding norms that aim at the regulation of (inter) action between agents and the environment (or other agents). Then those patterns can be identified with the transcendental-pragmatic rules that regulate normative meaning (and in the language of discourse theory are called 'discourse-rules').

In demarcating the limits of such an ambitious enterprise I would like to make explicit a series of assumptions that will guide the following discussion:

1. The discussion is situated within the environment of discourse theory. It shares with discourse theory the same interest in unveiling the normative groundwork of communication (meaning and understanding) through language, while it endeavours to take into account the referential function of language that is obliterated by discourse theory. To this effect, it employs something like a *post-metaphysical* explication of the ontology of norms which is based on the semantic structures of language. This is possible against the background of the tenet of anti-representationalism and the rejection of the mind-world dualism.

2. The proposed analysis endorses the idea inherent in discourse theory, that conceptual content largely depends upon the interpretative dimension of language which is characteristically intersubjective or communicative. The interpretative dimension of lan-

guage is consolidated within communal practices of communication. This is the conclusion suggested by Wittgenstein's private language argument which is employed against a radical scepticism of content, meaning and understanding. To that degree, the discussion is embedded in the broader movement within analytic philosophy commonly referred to as the pragmatic turn (part two).

3. In contrast to discourse theory, the proposed analysis *explicitly* rejects the idea of representations as the bearers of content. Rather, content and meaning are said to be constituted by the environment's direct impact on minds. According to this line of argument, practices are the bearers of the objectivity of content, meaning and communication only under the condition that they are not another representation or intermediary. Rather, practices are thought as constituting the environment which impinges upon minds. To ground this understanding a non-representationalist reading of Wittgenstein's argument is employed (part three).

4. The anti-representationalist explication of practices advances a holistic understanding of content and meaning in which mental content (and broader knowledge) is mediated by agency and vice-versa. In this holistic picture content (and in particular normative content) is not formed through the impact of separate fragments of the environment upon the mind but, instead, it is formed by the way practices impinge upon the mind. Practices organise the environment into a coherent whole¹. Outside them the environment does not make sense. This is going to be one of the main assumptions of the exposition. As a result, it is not enough for an anti-representationalist account to merely reject all intermediaries. It needs to take practices as constituting the environment that impinges upon our minds. For that reason an anti-representationalist explication of practices is indispensable for the overall analysis, while it advances and elaborates further on the shorter discussion of representationalism in chapter II.

5. Within those limits the analysis takes normative content to derive from the impact of normative practices on minds². Action-guiding norms are abstract objects that are located within the environment of normative practices. Mental content concerning these objects is generated by the impact of the practice-generated environment upon minds (part

1 This is the point at which content and meaning acquire a practical or action-guiding dimension: the point at which the conditions for the intelligibility of 'practice' become the conditions of content formation.

2 As already implied, discourse theory equates normative with non-normative practice (discourse) by assuming that any kind of practice (discourse) rests on the same transcendental pragmatic normative groundwork.

three).

6. In particular, the analysis focuses on the content of the pragmatic norms on whose ground a communicative practice is constituted (transcendental-pragmatic conditions of communication). These norms are – as every other norm – abstract objects attached, as it were, to the environment of practices. In contrast to all other ‘simple’ action-guiding norms which are somehow revealed along the way a community goes on, the norms that ground practice are the condition of that practice. Hence, their validity is tied up to the practice, yet it is a transcendental validity that ranks normatively as anterior to the practice: the transcendental norms set the standards according to which practice may unfold. The transcendental norms set, further, the validity conditions for all other ‘simple’ action-guiding norms (law, morality) (part three).

7. The transcendental norms that support communication put together a *Grundnorm* or super-norm of autonomy which grounds all communication (to that extent the rest of the transcendental norms can be thought as constituting tokens of the norm of autonomy). The norm of autonomy is the necessary presupposition for the intelligibility of all practices (part three).

8. The norm of autonomy envisages all potential subjects of communication as equal and free persons. In the discourse-theoretical picture, this means that all ‘simple’ action-guiding norms that are validated in discourses must abide by this requirement; this could also be explicated as meaning that all ‘simple’ action-guiding norms that are valid are tokens of the norm of autonomy. For that reason it makes sense to talk about norms as being revealed rather than constituted within discourses.

A last methodological remark: throughout the discussion I will abide by the main assumption of discourse theory that both normative and non-normative meaning rest on the same network of pragmatic-normative presuppositions. Thus, I will not discuss separately normative from non-normative meaning, but instead I will offer a short justification for their uniform treatment.

CONTENT AND LANGUAGE

Among the most important accomplishments of the early phase of analytical philosophy, commonly referred to as the linguistic turn, is the view that language enjoys the status of an indispensable epistemic presupposition of our knowledge of the world. According to this view, initiated by Wittgenstein’s *Tractatus*, the propositions which represent facts or states

of affairs are not merely the conditions for the possibility of the description of the facts (to be known) but they are also the conditions for the possibility of the existence of the facts to be described³. This transcendental interpretation of the Tractatus which establishes the *a priori* of language is in the best way summarised by Wittgenstein himself⁴:

The limit of language shows itself in the impossibility of describing the fact which corresponds to a sentence...without simply repeating the sentence.

It is precisely this thought that finds its elegant formulation in Tarski's semantic definition of truth: 'p' is true if and only if p'. Or in the famous example: 'snow is white' is true if and only if snow is white'. In order to describe under which conditions it is the case that the snow is white, we can not do anything else but repeat the propositional sentence that contains the description of the fact. In this sense the world-representation through the language seems to be an undeniable prerequisite.

It is, nevertheless, the case that the fact that snow is white should have a more objective status than its mere verbal reflection in a propositional sentence. From a *phenomenological* point of view one could object that it is possible for someone, through perception, to be certain that the whiteness of snow is not just his subjective opinion but corresponds to some objective fact. Perception would provide evidence that one's mental contents correspond to actual facts. Evidence through perception would gain then the objective status of a truth criterion that transcends the limits of language or -to be more accurate- that is language-free. Precisely in the way it is possible to photograph just the (objective) phenomenal parts of an object (e.g. a snow flake). Such a photograph represents the common objective level between all observers. Moreover this kind of evidence offers a way out of the vicious circle of a problematic purely logical-semantic correspondence theory of truth which is often related to the above transcendental interpretation of the Tractatus. As long as an interpretation leads to the circular formula 'a true proposition is what corresponds to a fact, and

3 K.-O. Apel, 'Ist Intentionalität fundamentaler als sprachliche Bedeutung? Transzendentalpragmatische Argumente gegen die Rückkehr zum semantischen Intentionalismus der Bewußtseinsphilosophie', in Forum für Philosophie Bad Homburg (ed.), *Intentionalität und Verstehen* (Frankfurt am Main: Suhrkamp, 1990), 13-54 at 20. Vide also K.-O. Apel, 'Szientistik Hermeneutik, Ideologiekritik. Entwurf einer Wissenschaftslehre in erkenntnisanthropologischer Sicht', in J.Habermas, D. Henrich and J. Taubes (eds.) *Hermeneutik und Ideologiekritik* (Frankfurt am Main: Suhrkamp, 1971), 7-44 (13-36).

4 From L. Wittgenstein, *Vermischte Bemerkungen* (Frankfurt am Main: Suhrkamp, 1977), 27 as quoted in K.-O. Apel, 'Ist Intentionalität', 20.

a fact is what corresponds to a true proposition', then one must indeed recur to a criterion of evidence for the correspondence between the intended and the real.

But the transcendental argument in favour of the *a priori* character of language is not so naïve: as already said, language is indispensable at the level of the description of the facts that can be the object of our knowledge⁵. And this appears to be the case even if the previous phenomenological objections are indeed justified. If we imagine a photo picturing a strange UFO or any other hitherto unknown object, no one will be able to say what it is. The pure, unadulterated fact of its existence may indeed qualify it as being there (perceptual evidence) but as long as the possibility of its propositional description is missing, we can not grasp it; we can not interpret it as being something. This is because the interpretative dimension presupposes the existence of a language. At the same time it is true that the transcendental-propositional argument cannot fully account for the interpretative dimension of language. Its formal-semantic character is too abstract in order to be able to do justice to the interpretative function of language and therefore it needs amendment. The point namely of the interpretative function of language is that it contains common linguistic symbols which provide for the depiction of the phenomena's meanings. This commonness introduces the element of the intersubjectivity that is in the first place missing from an abstract formal/semantic-propositional conception of the linguistic *a priori*. On this new or supplementary account knowledge is possible only through interpretation which is taken to be intersubjectively valid.

The acknowledgement of the interpretative dimension of language signals the departure of the philosophy of language from a pure logical-semantic understanding of language (pragmatic turn). The analysis is from now on focused upon the character of language as an interaction between speakers/agents reconstructed against the background of the speaker-listener relations (pragmatic level); that interaction is, further, embedded in communicative practices. 'Elementary unit' of the analysis ceases to be the proposition and becomes the speech-act, which optimally brings into expression the triangular relation between speaker, listener and the object to be known. This relation reveals further a series of normative-contextual implications which are rooted in the interaction of speakers as agents and which mark language as, perhaps, the most fundamental form of human action.

⁵ It might be helpful at this point to draw one's attention upon the fact that the linguistic argument for the indispensability of language departs from an interest for knowledge, whereas the phenomenological argument concerning perceptual objectivity is rather initiated by an interest for truth.

At this point discourse theory catches up with the pragmatic turn⁶: it attempts to make explicit the that any form of communication through language is a morally/practically-laden activity or practice that rests upon a series of pragmatic-normative conditions. As pointed out earlier in Ch. V, discourse theory endeavours further to organise those conditions into a corpus of rules (discourse-rules) that envisage communication as an interpersonal discourse. These rules are not merely formal rules concerning the syntactic clarity of speech, but are in a position to enable interpersonal understanding. In their interpersonal capacity those rules are capable of bringing about a non-private or objective account of content, meaning and understanding to the extent that content-formation and, further, knowledge about the environment are mediated by a communicative linguistic practice which is regulated by those rules. Furthermore, those rules are advanced as offering an appropriate underpinning of Wittgenstein's claim for the impossibility of a private language.

By the term 'private language' Wittgenstein seems to be referring to a language which is not merely monological but unintelligible and non-translatable to anyone apart from its originator, hence the use of the predicate 'private'. Such a language – Wittgenstein concluded – would necessarily be unintelligible to its supposed originator too, for he would be unable to establish meanings for its putative signs⁷. In the discourse theoretical reading of the argument, the necessary unintelligibility of a private language derives from the practical-pragmatic framework of any communication. Since this pragmatic framework shapes communication as interpersonal there is no room for any private language. The upshot of this line of argument is that any form of meaning is subjected to the practical-pragmatic presuppositions of language-as-communication, a thesis which captures in the best way the transition from the linguistic to the pragmatic turn (language cannot be abstracted from its communicative framework, hence all meanings are settled on the basis of some elementary practical/moral contents). Monologues also obey that rule; the reason is that even in the case of monologues semantic clarity and narrative coherence can only be guaranteed against the practical-pragmatic canvas of language-as-communication. Otherwise monologues would be private, hence unintelligible.

So far so good. But Wittgenstein's point can be understood as addressing a further worry: the worry that if language as practice counts amongst the epistemic conditions for

6 Vide the discussion of the philosophical programmes of Apel and Habermas in Ch V, part 2, *supra*.

7 For a short albeit very informative and up-to-date review of the *Private Language Argument*, vide St. Candlish, 'Wittgensteins Privatsprachenargumentation', in E. von Savigny (ed.), *Wittgensteins Philosophische Untersuchungen* (Berlin: Akademie Verlag, 1997), 143-165.

acquiring knowledge about the environment, this is only possible if practice is not conceived as being some new kind of mental intermediary between the mind and the environment⁸. In this respect the Wittgensteinian argument seems to take seriously the phenomenological objection stated earlier about an unadulterated, pre-linguistic grasping of certain parts or aspects of the environment. Wittgenstein seems to believe that the objection has a kernel of truth: the immediateness by which the environment shapes intentional content. To deny that would amount to falling back to some form of intermediary which, sooner or later, will undermine the possibility of (objective) content. Hence, if (linguistic) practice is a better means for explaining acquisition of content, this is the case only on the ground that it is located in the environment. Discourse theory does not appear to share this concern. Rather, a discussion of the problem seems to be lacking all together in the work of Karl-Otto Apel and Jürgen Habermas. However, from various passages on related topics it is legitimate to infer that discourse theory assumes that practice/discourse is something quite like a peculiar or special intermediary which is able to preserve objectivity, owing to minds' ability to grasp it in a uniform way. But if it is impossible to establish a point of contact between a pure phenomenon and the mind via mental representations, the problem does not vanish through a public practice as long as this practice is taken to be another kind of representation⁹; unless, of course, one assumes that the notion of 'practice' incorporates some magical representational powers.

In contrast, an understanding of practice as being (part of) the environment will be advantageous in several ways: it will sufficiently explain the objectivity of content and meaning as emanating from the normative background of practices. And it will account for the objectivity of the normative conditions that support practices; those will have the status of a *conditio sine qua non* for the intelligibility of any practice.

PRIVATE LANGUAGE AND MENTAL INTERMEDIARIES

Recent exegesis¹⁰ has treated Wittgenstein's private language argument as being about the content of intentional states and concepts, thus inscribing it into the discussions concerning

8 Or at least this is one of the most plausible interpretations of Wittgenstein's thoughts, which anyway are notorious for being amenable to competing interpretations. Vide *infra*, part three.

9 Vide the discussion on practices in part II, *infra*.

10 Vide in particular G. P. Baker and P. M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, vol. 2 of an Analytical Commentary on the Philosophical Interpretations (Oxford: Blackwell, 1988); S. L. Hurley, *Consciousness in Action* (Cambridge, Mass: Harvard UP, 1998); McDowell, 'Wittgenstein on Following a Rule' in Moore (ed.), *Meaning and Reference* (Oxford: Oxford University Press,

the relations between the mind and the world which pertain to contemporary philosophy of mind and epistemology. Understood this way, the argument is an attempt to clarify the reason why concepts we employ end up signifying things (objects, states of affairs, value-properties, etc.) in a way that is objective to anyone using them. Consequently, it is only at a later stage that the same argument can be taken to provide grounds for envisaging meaning and understanding as a communicative enterprise amongst rational agents, let alone for treating communication as a discourse which imposes upon its members moral or practical requirements. The merit of these further conclusions notwithstanding, it is important to treat the private language argument as what it is in the first place, before proceeding towards unfolding its rich insights concerning the practical requirements of communication *tout court*. It is in this way only that the reading of the private language argument can be demonstrated to disclose a holistic account of language and communication-as-action upon which the Habermasian project of Discourse-ethics rests, while avoiding the inconsistencies which a selective reception of the argument – as in the case of Habermas - might evoke.

Along these lines, the first step is to address the problem of the content of those mental states that constitute the outcome of our perception or the ground upon which our intentional action rests: why is it the case that these states (beliefs, desires, and so on) have one content rather than another, thus being able to tell us something determinate about the world, irrespective of the fact of their being true or false, and therefore to cause our intending to do something, irrespective of the fact whether we succeed or fail at doing it? Understanding why content is determinate or certain sheds further light on our understanding of how there can be a distinction between being correct (level of perception) or successful (level of intentional action) in one context and mistaken in another. In this respect the problem of content or the *problem of aboutness* refers both to the level of experience or perception as well as to that of intentional action¹¹.

The problem of content or aboutness is certainly a variation of the question about the relation between mind and world. This is the reason why the way one is going to account for the determinate character of concepts' content is very much dependent upon one's understanding of the mind-world relation. Thus a platonic philosopher would respond to the riddle of content by invoking a mysterious power of objects as such (objects meaning here both material and abstract entities) which have the ability to impinge upon minds. For the

1993), 257-293.

¹¹ Hurley, *Consciousness*, 221 n..

platonic philosopher:

If the question arises of whether someone meant add two rather than quad two, and so of whether he is wrong about addition or right about quaddition, it is in some way answered by the superior status of addition in this respect¹².

On the other hand a Cartesian or *lato sensu* mentalist philosopher would try to solve the problem of content by appealing to some intrinsic qualities of objects stemming from the opposite direction, i.e. that of the mind. In this case they are images, formulations of rules, experiences or feelings that possess the mysterious power to draw the world towards the mind and in this way to bridge the mind-world gap.

The relations between mind and world, as reflected upon the problem of the content of concepts, are a central part of Ludwig Wittgenstein's later philosophy and particularly of his considerations about rule-following and the private language argument. In these considerations of his, Wittgenstein rejects both platonic and mentalist explanations of the content or meaning of concepts as futile and unsatisfactory. For him platonic constructions of the world's intrinsic mind-drawing powers are inasmuch idle as are their correlative mentalist constructions of those world-indicating powers that are intrinsic to minds¹³. There is, however, enough evidence to suppose that this rejection seems only to be symptomatic of a more general and all-encompassing rejection. Platonism and mentalism are, according to this assumption, rejected only as the most extreme and therefore naïve versions of a deeper problem: the deep-rooted mind-world dualism. As long as this gap is maintained not only absurd platonic or mentalist intrinsic qualities of items (worldly and mental respectively) fall short of bridging it, but so does any other kind of intermediary, either platonic or mentalist in nature, along with their interpretations, as well as any criteria for the determination of the interpretations (including the appeal to any sort of practice). To that extent Wittgenstein's account might well be taken to emerge on the level of the theory of meaning but cannot be convincingly restricted there, thus excluding any considerations in the realm of epistemology or the account of how we acquire knowledge of the world¹⁴.

The discussion is going to unfold as follows: first I attempt to scrutinise representative intermediaries which picture the environment (ideas, images etc.) and are alleged to

12 S. L. Hurley, *Consciousness*, 223.

13 Vide Hurley *Consciousness*, 223.

14 For a brief overview of the epistemological relevance of a 'private language', vide B. Wilson, *Witt-*

provide for determinate connections with it. Second, after these intermediaries are shown to depend upon interpretations and therefore to fall short of providing determinate meanings, the appeal to practice is employed as a safe way to provide determinate interpretations of representations of the world.

Intermediaries

Since the *Myth of the Given*¹⁵ cannot be sustained in its full range one has to introduce intermediaries which undertake the task of bridging the mind-world gap. As long as the mind-world dualism is not put into question intermediaries of various kinds are the only way of filling the gap. The main idea behind intermediaries goes roughly as follows:

Concepts (or their meanings) are embedded in symbols and words within languages. We use words in order to describe worldly things (material and non-material), to express thoughts, judgements, desires and hopes. For some reason we take our words to mean or signify the same thing each time we use them. Surprisingly enough we even take words from different languages to signify the same thing each time we use them. But our words (or language) do not have any kind of natural connection with the world (at least under the dualistic conception). The fact that we nevertheless keep on using words and understanding them does not account for the kind or the nature of the determinacy of meanings or the concepts' contents. What is it that connects language with the world in such an unambiguous way that we keep on understanding meanings in one way and not another? If a dualist wants to account for this connection he needs to introduce a *tertium*; an intermediary between mind and world, which has to be of a double quality: on the one hand to be of the same substance as linguistic units are – i.e. mental – and on the other hand to stand in a privileged relation or, rather, connection with the external world. According to this idea words need to be reinterpreted into an intermediary that has its own 'lines of projection into the world'¹⁶ or, in other words, its own powers to represent the world. This double hypothesis constitutes what has been called a *dog-legged*¹⁷ theory and can readily be shown to suffer from a dou-

genstein's *'Philosophical Investigations'* (Edinburgh: Edinburgh University Press, 1998), 7-16.

15 This is the idea that our judgements never fail to say something about the world, owing to the latter's (somehow magical) ability to guarantee an objective justification of our judgements. The term was first introduced by Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Cambridge, Mass.: Harvard University Press, 1997) and has since been employed regularly in discussions concerning the mind-world problem; vide amongst others McDowell, *Mind and World* (Cambridge, Mass: Harvard UP, 1994); S. L. Hurley, *Consciousness in Action*.

16 Vide Blackburn, *Spreading the World* (Oxford: Clarendon Press, 1984), 43.

17 Ibid. 42.

ble deficiency: First, the reinterpretation of our words and symbols into another medium might not be as unproblematic as these theories take it to be. Second, the representational powers of the intermediary might themselves be in need of interpretation in a way that would cancel the unambiguous character of the representation. Representation would be in this case substituted by a chain of interpretations or the need for a new intermediary that would be able to provide determinate outcomes, hence a *regressus ad infinitum* would arise. The gravity of these deficiencies depends, of course, upon the nature of the intermediary employed. If the representative medium is grounded on the side of the mind (like say the Lockean *ideas*), then it is much more likely that the regress will emerge at the level of representing the world, since the mentalistic character of the intermediary will make it fairly easy to connect it to things like words and concepts. And vice-versa: if the intermediary employed counts as a distillation of the world (like say the Platonic forms) then it is much more likely that the regress will lurk on the level of the connection of the medium to linguistic entities.

Ideas

Locke uses the concept of *ideas* in his theory of understanding in order to account for the way we connect determinate meanings to our words. In doing this he places himself in the philosophical tradition of Aristotle and Hobbes in which Ideas are the mental likenesses which men form, whenever their minds are confronted by things which belong to the external world¹⁸. Locke believes that our ideas as mental representations of the world are hidden somewhere in 'our Breast'¹⁹. We on the other hand come to make use of our words as the signs of our ideas in order to record our thoughts in our memory or to expose them in front of others. This connection is no natural connection between particular sounds and certain ideas, but a voluntary one. This is so because for Locke: '...words in their primary or immediate Signification stand for nothing, but the Ideas in the Mind of him that uses them'²⁰. This passage reveals a lot about the place of ideas in Locke's theory of understanding. Since words are voluntary they cannot signify anything with a natural or inevitable necessity. *Ergo*, according to Locke, they can only be used by men to signify things they know. So far so good, as long as the implied premiss is that we cannot make signs signify something,

18 For a brief account vide Blackburn, *Spreading the World*, 41-42.

19 As cited in Blackburn, *Ibid.* 41.

20 This is the expression Locke uses at the beginning of the 2nd chapter of his *Essay Concerning Human Understanding*; cf. with Blackburn, *Spreading the World*, 41.

unless we have to a certain extent some knowledge of that thing²¹. But Locke's argument suppresses another premiss, namely the premiss that our words can only be used to signify ideas, because ideas is all we (can possibly) know. In the Lockean universe everything we know about external, worldly objects, other people and abstract entities, we know only derivatively through the immediate knowledge of our ideas. Hence, our knowledge of things like chairs, clouds, the sun, numbers or other people is not immediate but just a reflection of our genuine knowledge of the respective (or corresponding) ideas that hide in our breast. Which fact, of course, makes it very difficult to have any reason to suppose that we know anything about the world, and that there is something more in the world apart from our ideas or, to put it differently, that we are not just brains in a vat connected to a powerful evil computer which supplies us with stimuli.

The inability of the theory of ideas to account for our knowledge about the world appears to be connected with a serious problem on the level of content. How is it possible to relate our words or concepts to the external world through the medium of ideas? The whole point behind the theory of ideas was to provide for a reliable medium that would be related to the metal fabric of our words and concepts, but which, simultaneously, would be able to establish connections with the world in a more determinate way than our linguistic symbols do. Ideas can certainly meet the first demand since they are as much mental as linguistic symbols are, but fall short of succeeding in their second task; namely the task to provide for a determinate connection to the external world. They seem to be as inappropriate for this task as words are. The assumption then that words point out through such things like ideas to a different class of things which are part of the external world, would seem somewhat improbable. It would be rather the case that we would need a new medium in order to get ideas out of 'our breast' and connect them to the external world. But if we are in need of something like new ideas in order to reinterpret our ideas a dangerous regress would be *ante portas*! It would be pretty much like trying to get someone to understand that a painting might represent a landscape by showing him more and more paintings²².

It seems that the theory of ideas, at the end of the day, is doomed to fail in accounting for the meaning or the content of concepts and, broader, intentional states. But this is the case for any other theory which introduces intermediaries as private reproductions of reality

21 Ibid. 41.

22 Cf. Blackburn, *Spreading the World*, 42.

(what Blackburn calls dog-legged theories)²³. Reproductions of this sort are supposed to explain how words can be understood to refer to an environment that they themselves reproduce. These reproductions must themselves be taken as representative of the external world, and in this respect we don't have any satisfactory explanation of what it is to so take them²⁴. If we need to introduce another medium in order to illuminate the powers of the first reproduction, we face the danger of sliding into a regress like the Atlas problem²⁵: the regress, namely, which occurs when providing an explanation of why the world stands in its place by saying that it is carried on the shoulders of Atlas and when we are asked who carries Atlas, then change the subject. This danger will always lurk as long as we don't explain the representative powers of the original medium and instead introduce a new medium that seems to require the same kind of explanation as the original. Furthermore this danger will be present as long as the indeterminacy of words and concepts is relocated in explanatory intermediaries and then anew in the intermediaries' interpretative methods (or media).

The lack of any direct, intrinsic connection of words with the things they signify has, in the first place, generated the need for an explanation of the fact that we understand them in one way and not another. The answer was that if we are to understand them in a determinate way, then we need to know what they signify. In order to know what they signify, the argument goes, we must have a way of representing to ourselves what they signify in a more reliable way. This is the moment where ideas are employed. But this is also the moment where the indeterminacy of words is transferred to the explanatory intermediary (i.e. to ideas): if ideas are just a way of representing things to ourselves then they do not seem to be less voluntary than words when applied. In this case we are once more in need of a new medium (something like second-order ideas) in order to know what our original ideas represented. This absurd regress would only be interrupted, if it would be possible to introduce an intermediary which is essentially representative, i.e. its existence within our minds would guarantee that we know in a determinate way which part of the external world is represented²⁶. Such an intermediary should not just be a way of representing things to ourselves, but the way of representing things *erga omnes*:

A medium whose mere presence ensures that it also represents the right thing....a medium which carries its own interpretation with it,

23 Ibid. 40.

24 Ibid. 43.

25 This is a paraphrase of Blackburn's term 'elephant problem'. Cf. Blackburn, *ibid.* 43-44.

26 Cf. Blackburn, *Spreading the World*, 44.

so there is no possibility of misunderstanding what is thought of,
once it is present²⁷.

In contrast to ideas, whose private character renders them insufficient in accounting for the explanation of meaning and content, the new medium's explanatory power has to rely on its direct representative character irrespective of the fact of being located in minds.

Images

Images seem *prima facie* to be a strong candidate as a solution to the problem of the perfect representational intermediary. First, they possess a sort of self-evident ability to intrinsically re-present particular objects or aspects of the world by their mere presence, in the way a photograph 'copies' those bits of the world which the camera points at. Second, the forming of images seems to be a rather uncomplicated and non-mysterious ability of our minds. Images were the main ingredient of the so-called picture theory of meaning which Wittgenstein endorsed in his early work and later renounced. However, a closer look on images reveals a series of problems that prevent them from being able to account for meaning and understanding.

Blackburn demonstrates this inadequacy against a simple thought experiment²⁸. He imagines a landscape which contains unthinking objects and a number of mirrors or pictures which respectively reflect or picture those objects. Then he goes on to remark that the mirrors, in whatever angle they are located, do not add any more significance to the landscape, as the one that was already there before any mirrors or pictures:

The landscape and its pictures may reflect each other perfectly well, but this in itself gives us no ground for saying that the pictures...are thinking of features of the landscape, any more than that the features of the landscape signify the features of the picture²⁹.

The point, in other words, is that the employment of images in order to explain meaning and understanding could amount to a circular argument. The way we take an image to represent one or another feature of the environment depends rather upon our method of projection of the picture on the world and not upon an intrinsic feature of the picture itself. Wittgenstein

27 Cf. Blackburn, *ibid.* 44.

28 Vide Blackburn, *ibid.* 45.

29 *Ibid.* 45.

tries to point to this with a simple example³⁰. He imagines an old man climbing up a hill; then he concentrates upon his image carefully. Could it not be, he asks, with a high probability, that the old man is rather sliding backwards down the hill? What decides which is really the case is not a quality intrinsic to the image but the interpretation one imposes on it. On the other hand, if one tries to justify the interpretation by saying that the image has to be taken in this way 'because the man is climbing on the hill', then one starts going in circles and misses the whole point. Namely, that images were introduced as the very intermediary to explain how we understand these words in the first place. Thus, the conclusion is that the image of the man can not account for the meaning of the expression 'a man is climbing the hill'.

Images thus fail to account for understanding despite the fact that they were put forward as the ideal representational medium, owing to their intrinsic ability to literally represent things. But because a picture is susceptible to interpretations and also because a picture's mere presence is not by itself sufficient to guarantee any particular way of taking it. Thus images are proven to be incapable of putting an end to the regress of interpretations. And if images cannot halt the regress of representations then nothing can. This failure might give rise to the suspicion that the problem does not lie with images or representational media in general but with the original reasoning that generated the need for representation. Namely the argument that the need to take words in a determinate way has to amount to the need to find a way to (objectively) represent to ourselves what it is that they stand for. It might be, on the contrary, that representational media and images in particular, are not indispensable for the content of our thoughts in the first place let alone for understanding.

Wittgenstein tries to make a case against representational media in a theory of content by considering what happens when we ask somebody to 'fetch a flower from the meadow'. According to an image-based theory of understanding this person would have to determine a mental picture of, say, a red flower, or a red patch, which he holds until he finds a real flower that corresponds to it. But Wittgenstein goes on to object to this picture:

...this is not the only way of searching and it isn't the usual way. We go, look about us, walk up to a flower and pick it, without comparing it to anything. To see that the process of obeying the order can be of this kind, consider the order 'imagine a red patch'. You are not tempted in this case to think that before obeying you must have imagined a red patch to serve you as a pattern for the red

30 As mentioned in Blackburn, *ibid.* 46-47.

patch which you were ordered to imagine³¹.

By highlighting the regress Wittgenstein wants to show that the image of the flower cannot explain the understanding of the imperative 'fetch a flower' because it itself presupposes the understanding of that imperative:

(The image) can only figure in an explanation if we understand that *it is the right image*...knowing which is the right kind of flower is not explained by knowing that the flower matches some given pattern, unless we also know that it is the right kind of pattern. But recognising patterns to be the right ones is no easier than, or different from, recognising flowers³².

The need to represent to ourselves objects or aspects of the world seem rather to complicate things than to contribute to a solution of the problem of content and meaning. Representations just re-present the world and along with it they re-produce the problem of meaning. In fact they duplicate the problem of meaning: apart from the initial need to connect the world to our language, an additional need emerges: to connect language with our images which are supposed to account for the language-world relation³³!

Practices

Wittgenstein and his commentators seem to be clear about the implications of Lockean dualism for the theory of meaning. Given the mind-world gap no conceivable intermediary is in the position to efficiently bridge it. Such intermediaries as ideas or images at the end of the day merely create a regress of interpretations and therefore fail to promote the idea of meaning and understanding. However, aside from the unanimity that prevails in respect to the negative conditions of meaning, there seems to be little agreement about what positively makes meaning possible. Wittgenstein's well-known appeal to practices as the vehicle of meaning and understanding has not been interpreted or understood in a uniform way.

Wittgenstein's appeal to practice is a composite argument that mainly combines two individual arguments: the so-called *practice* and *use arguments*³⁴. The use argument departs from the insight that all questions about meaning can be rephrased as questions about use. According to Wittgenstein: 'for a large class of cases – though not for all – in which we

31 L. Wittgenstein, *The Blue and Brown Books* (Oxford: Blackwell, 1974), 3.

32 Blackburn, *ibid.* 49.

33 Similarly Blackburn, *ibid.* 50.

34 Vide B. Wilson, *Wittgenstein's Philosophical Investigations*, 17-24 and 45-56.

employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language’ (PI 43)³⁵. This definition is usually taken to support an argument for the impossibility of a private language. One should be careful at this point: private languages or, in other words, uses of concepts or private ascription of contents to concepts are according to the use argument not meaningless *lato sensu*, i.e. unintelligible in terms of syntax and grammar, but meaningless *stricto sensu*, i.e. deprived of any practical consequences, useless³⁶. It is this lack of an ordinary or reputable use that deprives any private language from real meaning. Employing private definitions, to use a favourite analogy from the *Philosophical Investigations* (henceforth PI), is tantamount to my right hand offering money as a gift to my left hand. Wittgenstein comments on this exchange that it is futile because ‘the further practical consequences would not be those of a gift’³⁷. Analogously, in the case of the private definition, the practical consequences would not be those of ascribing meaning to our expressions: if one says ‘I have something’ referring to a private object in one’s mind, this expression would pass the normal grammatical and logical tests for meaningfulness, but not the test of use. ‘I have something’ is, in this case, practically meaningless since we have no idea what a more detailed description of a private object would be³⁸.

The use argument is further supplemented by the so-called practice argument. Within the practice argument the use-criterion of meaning becomes use as part of a concrete practice. Wittgenstein stresses the point that the “appropriate ‘mental accompaniments’ plus the appropriate behaviour, do not constitute following a rule, making a chess move, being guided by a sign-post. There must also be a practice in each case, to which the behaviour in question conforms or belongs”³⁹.

At this point it should be said that Wittgenstein’s appeal to practices is strongly founded on the insight of the normativity or regularity of meaning. It is this very idea of meaning as rule-following that leads Wittgenstein to appeal to practices, since rule-following before anything else, or aside from everything else is practice, or performance⁴⁰.

At the same time there is a big controversy among commentators about whose prac-

35 Cf. Wilson, *ibid.* 45.

36 Vide Wilson, *ibid.* 45-56, who even distinguishes an autonomous ‘consequences argument’ within the PI, *ibid.* 14-16.

37 L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1973), §268.

38 This is more or less a summary of the presentation in Wilson, *ibid.* 52-53.

39 Cf. Wilson, *ibid.* 18.

40 Vide McDowell, ‘Wittgenstein on Following a Rule’; and Hurley, *Consciousness in Action*, 225n.. Against this idea is Wilson, *ibid.* Appendix, 134-145.

tice Wittgenstein refers to⁴¹. Is a single individual's practice sufficient in producing meaning, or must one recur to more public forms of practice, like the community's linguistic practice, in order to account properly for meaning and understanding? Wittgenstein does not seem particularly concerned to clarify the kind of practice he is postulating (public or private). His concern within the practice argument is rather to connect meaning (as rule-following) with use and practice. After having shown, in numerous passages of the PI, that all intermediaries between a rule and its application cannot guarantee the determinacy of meaning he points to practices as the solution to the regress resulting from interpretations and other intermediaries. If it is for meaning to be construed as a normative notion then there must be something which gives rule-following an objective status that enables speakers to say that they are saying this thing and not that; this item has further to provide for an objective criterion that would tell right from wrong applications of rules. This is something that cannot be generated by interpretations. Rule-following, as Wittgenstein insightfully demonstrates in the PI, succumbs to deep scepticism if one starts relating rules to applications (or courses of action) via interpretations or other intermediaries:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here. (PI, §201)

Normativity of meaning and understanding seems to go astray as long as it is accounted for in terms of interpretation and other intermediaries. Wittgenstein's remedy, i.e. use and practices, is therefore presented not merely as a supplement or an alternative to the discredited intermediaries but as something radically different from them. Following a rule, producing meanings, is according to this insight not an interpretation:

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping a rule which is not an interpretation, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases. (PI, §201)

What is then the advantage of practices over interpretations and other intermediaries? Does

41 Vide instead of others Hurley, *Consciousness*, 225 n..

it, further, make a difference if one talks about public practices instead of private? In what follows I am going to discuss the difference in strategy pertaining to different kinds of practice (private or public). Then I will relate the conclusions to the earlier discussion about the mind-world dualism. This will show that the introduction of practice into the theory of meaning amounts to a powerful critique of the epistemological thesis of (Lockean) dualism.

Private practice

There is a number of commentators who believe that the practice of an individual is enough in order to escape the regress of interpretations. Blackburn takes the example of the born Robinson Crusoe who develops a technique for solving a Rubik's cube washed onto his island, in order to show that a solitary individual could develop a practice or technique and could abide by rules. This thought, however, appears to be in conflict with a number of remarks in the PI which, *prima facie*, deny the possibility of private practices. Thus Wittgenstein says in sec. 199:

It is not possible that there should have been only one occasion on which someone obeyed a rule. It is not possible that there should have been only one occasion on which a report was made, an order given or understood; and so on.- To obey a rule, to make a report, to give an order, to play a game of chess, are customs (uses, institutions).

Or in the more famous sec. 202:

And hence also 'obeying a rule' is a practice. And to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it.

These remarks have led many commentators (like Saul Kripke or Norman Malcolm) to object that practice, at least in the way Wittgenstein employs the term, means communal or public practice. Under this scheme we can indeed regard a born Crusoe as having his own 'private', as it were, practice, but we can only do so by projecting upon him the point of view of our own community. Blackburn comments on this objection that:

it is not clear what this means, nor whether it gives the community any particular prominence in the creation of meaning... The problem that Crusoe poses is that he does have a practice (follows a rule) regardless of how we or anybody else think of him. Of

course...it is our judgement that he is following a rule. But this does not bring our community or any community far enough into the picture. It would be our judgement that an island has a tree on it. But whether an island has a tree on it is quite independent of how we or any community describe it, or even of whether any community exists to describe it⁴².

And then he goes on observing that one must not fall in the trap of automatically equating practice with public practice, since this equation requires an independent argument showing that the practice of isolated individuals cannot count.

But even if individual practice can indeed be considered as a valid candidate in accounting for meaning and understanding does it do the job any better than the discredited interpretations? Let us consider the famous example of the student who applies the rule 'add two'⁴³. Our student having counted by twos all the way up to 1000, he then goes on: '1004, 1008...' and so on. Upon our challenge he responds that he is not making a mistake, that this is what he was doing all along and that this agrees with his prior uses of the rule 'add two'. And indeed why are we entitled to think that he is wrong in applying the rule of addition rather than being right in applying another rule, say that of 'quaddition' (which is his own private use of the rule 'add two')? Appeal to his prior uses of the rule does not help more in order to give a determinate answer as to which is the actual meaning of the rule in question. Every party could 'read' in the student's prior uses one's own interpretation precisely because uses and practices do not interpret themselves anymore than anything else (images, ideas, etc.) does. The student's own appeal to the agreement of his present application to his prior uses of the rule cannot stop us from imposing on him our own interpretations:

It doesn't help ... to appeal to the agreement of the application in question with his other applications up to now, because what's at issue just is what determines whether those previous applications agree with this way of going on or that one; they don't interpret themselves⁴⁴.

Clearly (private) practices do not prevent the regress from arising, because they are themselves open to multiple interpretations. They more or less behave like private sensations, images and ideas. Hence any practice can be made out to accord with the rule, or to conflict with it (PI 201). Private practice or the practice of an individual does not seem, therefore, to

42 Vide Blackburn, *Spreading the World*, 84-85

43 Vide the discussion in Hurley, *Consciousness in Action*, 225-229.

44 Cf. Hurley, *ibid.* 227.

be a reputable candidate in resolving the regress which threatens meaning. Private practices are proved to be trapped in the mind-world dualism in the same way that images or ideas are and therefore they end up merely being one amongst many other intermediaries. But intermediaries are inescapably subjected to multiple interpretations and are, for this reason, incapable of guaranteeing meaning and understanding. These remarks lead to the conclusion that private practice can be fruitful only if it is conceived in a distinctively different way from mental entities like images, ideas and other relevant intermediaries. In other words if it is for private practices to have any worth in the account of meaning and content, one has to seriously address the problem of mind-world dualism. As long as one accounts for (private) practices within the realm of dualism one is going to face the same problems that emerge from the employment of mental intermediaries.

There is, nevertheless, a number of philosophers who, without properly addressing the problem of dualism, appeal to public or community practice in order to escape the inadequacy of the private practice account. This strategy is equally bound to fail, as long as it remains hostage to a dualistic epistemology. In the dualistic landscape community practice encounters exactly the same problems as the private one.

Communal practice

Inserting an interpretation between a representation and what is represented does not explain the connection between them. The reason is simply that interpretations are themselves open to new interpretations and so on. The regress amounts to a total inability to explain meaning and understanding with the notorious effect that no course of action can be determined by a rule, because every course of action can be made out to accord with the rule. Private practice does not seem to be able to offer a solution out of the regress. Still Wittgenstein keeps talking of practices in his effort to offer a solution to the problem. Furthermore it is indeed the case that he often mentions practice in the context of a more collective form of social practice and at the same time contrasts this public practice to private practice (as in the famous sec. 202 of the PI, cited earlier).

This has led some commentators to conclude that the regress is something which cannot be entirely avoided and that one has to learn to live with it⁴⁵. The regress, on this account, leads to a serious scepticism about the concepts' content and meaning which can

45 Op. cit. 227. *Locus classicus* for this view is Kripke, *Wittgenstein on Rules and Private Language* (Oxford: Blackwell, 1984).

be only dealt with if one develops something like a sceptical solution⁴⁶. This solution cannot dispense with the regress but aims to provide us with some guarantee in order not to lose any concept of meaning and understanding⁴⁷.

The sceptical solution strives to moderate the regress by substituting communal practice in the place of interpretations and other intermediaries. Communal practice, on this account, is something not entirely different from interpretations. It is rather something like a safer criterion for arriving at more objective interpretations, owing to its being grounded on the way the majority of the members of a community apply meanings. Conceived in this way, communal practice is obviously deprived of any objective or stable content and is constructed in pure behavioural terms. Its content consists in pointing out just how one has learned -through communal practice- to react to specific situations⁴⁸. In this way the sceptical solution is supposed to be *anti-realist* because it renounces the existence of any kind of items like images or ideas or any metaphysical patterns and platonic rails. At the same time it endeavours to reject, on the one hand, the view that the relation between a rule and a course of action is nothing more than a relation between brute movement and its casual explanation and, on the other hand, to avoid idiolectic interpretations, (which cannot guarantee any objective meaning)⁴⁹.

Prima facie the main problem of the behaviourist sceptical solution is that it fails to provide for an 'innerness' or *certainly* of meaning. Moreover, when compared to the discredited intermediaries it does not seem to demonstrate any serious advantage. It is true that inner entities (like images or ideas) were inner (hence private) to such a high degree that, at the end of the day, they were incapable of generating objectivity. But, at least, they were fulfilling the purpose of their employment, namely to relate meaning to something indisputable⁵⁰. If the problem there was that mental entities were placed in the heads, hence too

46 'A 'sceptical solution' to a sceptical problem is one that begins....by conceding that the sceptic's negative assertions are unanswerable'; vide McDowell, 'Wittgenstein on Following a Rule', 257-293 (262).

47 For a recent revival of the discussion between those who endorse the sceptical solution and those who reject it vide George Wilson, 'Semantic Realism and Kripke's Wittgenstein', *Philosophy and Phenomenological Research*, 83 (1998), 99-122 (who defends Kripke's interpretation); and Michael Kremer, 'Wilson on Kripke's Wittgenstein', *Philosophy and Phenomenological Research*, 85 (2000), 571-584 (who criticises Kripke's views).

48 Vide McDowell, *ibid.*, 275.

49 McDowell, 'Wittgenstein: On Following a Rule', 262.

50 McDowell seems also to acknowledge this point when he writes: '...The idea of interpretation seemed hopeful because it promised to enable us to attribute, to items (he refers here to ideas, images, etc.) that are in themselves normatively inert, a derivative power to impose a normative classification on items in the world outside the mind', vide McDowell, 'Meaning and Intentionality in Wittgen-

remote from each other for meaning to be possible, in the behaviourist account the problem is even more acute: public or community practice is taken to be totally independent of any stable pattern, hence to be totally random or contingent. The account of meaning and understanding from the sceptical solution's point of view more or less amounts to the following picture:

At the basic level of any language-game, there are no normative elements (rules) to be found. We merely have brute facts (movements, sounds, etc.), which need to be interpreted in order to obtain meaning. This interpretation cannot be idiolectic but has to be performed on a communal basis in order to guarantee objectivity. The criterion of objectivity is in this case the fact that the community, or the larger part of the community happens to agree in doing this rather than something else (which, on another interpretation, could also be shown, to fall under the same course of action). To that extent, the Kripkean account of the linguistic community seems to share some common features with Habermas' formal idea of the argumentation-community⁵¹. In both cases the validity of the relevant speech acts is judged against the background of a communal practice which is devoid of any further normative criteria. To follow a rule is equated here to an ex post ratification according to the reactions of the community. This behaviourist account falls short of being able to generate a persuasive account of why meaning and understanding are possible, let alone of persuading us that it is Wittgenstein's intended solution in relation to the indeterminacy problem. The main reason is that such an account of the community's practice is circular and derives its normativity from its normality/regularity (in the sense of habitual repeating). Therefore, it fails to generate a satisfactory concept of meaning (or any concept of meaning at all) and communication⁵². This failure becomes apparent every time a dispute arises among the members of a community about the true meaning of a previously established (and now challenged) communal practice. Then easy cases become hard cases that cannot be an-

stein's Later Philosophy' in McDowell, *Mind, Value and Reality* (Cambridge, Mass.: Harvard University Press, 1998), 263-278 (265).

51 Vide Ch V, *supra*. In any case, this is by no means a claim about a common theoretical background of the two concepts. Habermas' concept is much richer since it perceives the discourse-rules as necessary normative criteria for the realm of speech/argumentation.

52 McCulloch demonstrates accurately the inconclusiveness of the *sceptical conclusion*: 'If Wittgenstein really has demonstrated that understanding cannot be explained in terms of inner processes, the contemplation of ideas, the grasping of senses and so on, then all we are left with are dispositions to use words. So if they cannot deliver an account of meaning and understanding, *there are simply no such things*...But the outcome here is spectacular: there is no such thing as meaning, and there is no such thing as correct understanding of language', in McCulloch, *The Mind and its World* (London: Routledge, 1995), 104.

swered through a 'shared' background, since the 'divided', or better, disputing community can no longer generate safe criteria of meaning orientation.

Norman Malcolm, another philosopher who alludes to this picture but tries to avoid the behaviourist reduction, goes a step further in holding that Wittgenstein's claim is that there is a conceptual necessity between the existence of a community and the possibility of advancement of practices or techniques concerning meaning and understanding: '... the actual presence of a multiplicity of persons is necessary if a person is to have thoughts, devise a system of signs, set down rules of action for his own guidance and so on...' ⁵³. But even this qualification does not save the account, at least not as long as one still remains within the realm of the mind-world dualism. Even if one concedes that there is a conceptual connection between practice and the content and meaning of concepts, one does not yet explain why this practice has to be communal rather than private ⁵⁴. In fact, it seems, that there are reasons for supporting the contrary: whatever the problems of private practices are they can be claimed to equally burden public practice ⁵⁵: Simon Blackburn puts the problem like this:

The members of a community stand to each other as the momentary time-slices of an individual do. So just as the original sceptic queries what it is for one person-time to be faithful to a rule adopted by a previous person-time, so the public sceptic queries what it is for one person to be faithful to the same rule as that adopted by another ⁵⁶.

In more general terms, one could easily conceive communal practice as being as idiolectic as that of a 'private' individual. For instance, when one compares practices between different communities. This means that if one wants to escape a behaviourist 'majoritarian' account of meaning, which eliminates all certainty of meaning, one discovers that community practice does not very much differ from the private one. Both types of practice seem to face exactly the same problem, i.e. they don't seem to be able to provide for determinate mean-

53 Cf. Wilson, *Wittgenstein's Philosophical Investigations*, 19.

54 For the lack of any such conclusive argument in the Wittgenstein literature vide Wilson, *Wittgenstein's Philosophical Investigations*, 17-24.

55 Susan Hurley calls the community-practice view the *socialised version* of Physiological Individualism, or the view that there is no necessary 'relationship between the contents of someone's mind and what someone does, on the one hand, and the character of his natural or social environments, on the other'. The socialised version might avoid individualism but is credited with the incapability of keeping 'the problem of arising again in a socialised form, as a consequence of the collective independence of mind from the world'. Vide Hurley, *Natural Reasons: Personality and Polity* (Oxford: Oxford UP, 1989), 23.

56 Vide Blackburn, 'The Individual Strikes Back', *Synthese* 58 (Pages), 294, as cited in Hurley, *Con-*

ings.

All these remarks do point in the same direction: irrespective of which type of practice (private or communal) one chooses to insert at the bottom of one's account of meaning, one has to cope with the same problem: practices do not interpret themselves more than all other 'discredited' mental intermediaries do⁵⁷. This amounts to the fact that every practice is open to multiple interpretations with the effect that any practice can be brought into accord with a rule or to conflict with it. The question which practice agrees with a rule or with a prior practice cannot be answered by pointing to the fact of the agreement. Agreement is what we are trying to establish. It would be a useless *petitio* to use it for justifying itself. Wittgenstein's words illustrate vividly this point:

One does not learn to follow a rule by first learning the use of the word 'agreement'. Rather, one learns the meaning of 'agreement' by learning to follow a rule⁵⁸.

And in another passage:

It is no use, for example, to go back to the concept of agreement, because it is no more certain that one action is in agreement with another, than that it has happened in accordance with a rule⁵⁹.

If practices are conceived as another intermediary they do not seem to escape the regress which renders mental intermediaries useless in accounting for content and meaning. If no sign or image as such can generate its own interpretation, neither can any practice (or agreement in practice). This amounts to the conclusion that agreement in meanings does not follow automatically from agreement in practice⁶⁰. But the sceptical solution is grounded on exactly the opposite conclusion. It starts by recognising the inability of private sensations, images and even private practice to account for determinate contents and meanings, only to go on, later, to say that community agreement in practice can establish determinate meanings. In other words it starts by stating that nothing stable underwrites content and then goes on to make a strong case that content is guaranteed by the contingent fact that we happen to

consciousness, 227.

57 Vide the discussion of Hurley, *Consciousness*, 229-233.

58 Vide L. Wittgenstein, *Remarks on the Foundations of Mathematics*, G. H. von Wright, R. Rhees, and G. E. M. Anscombe (eds.), 3rd edn, (Oxford: Blackwell, 1978), 405; quoted in Hurley, *Consciousness*, 233.

59 Wittgenstein, op. cit., 405; quoted in Hurley, *Consciousness*, 233.

agree in doing this rather than that. This is like first saying that meaning, on the account of private entities, is impossible because of the contingent or indeterminate character of these mental entities, while on the other hand trying to ground meaning on another contingent factor, namely the fact that we happen to agree in doing this rather than that. But if nothing underwrites meaning (because everything that could be taken to underwrite it is contingent – this seems to be the implicit premiss of the sceptical solution), then it is inconsistent for the sceptic to help himself to something he has already denied (meaning based on contingent practices). Susan Hurley writes:

...it is not an adequate answer to say that the solution that practices provide is a sceptical one, that nothing underwrites content, and that we just, contingently, happen to agree in doing this rather than that. This answer simply fails to take the point: the problem, if there is one at all, runs to as much to action...as to sensation or anything else. Unless it's defused, it deprives us even of arbitrary, groundless decisions...If the absurd conclusion is in force, we're not entitled to talk about what we just do, whether contingently or not, about our practices or decisions or choices or anything intentional in the way needed, because they are content-presupposing; this would be a case of the sceptic helping himself to resources his own argument denies him⁶¹.

Disclosing an inconsistency within the sceptical line of argument will not do any good to the effort to rescue content and meaning. On the contrary: it might be the case that the consistent sceptic conclusion is that one should discard meaning tout court. This is probably the most likely conclusion to draw anyway after having diagnosed the radical indeterminacy of both mental intermediaries and practices (private or individual). This rather pessimistic conclusion does not need to pertain, though. Prima facie it can be refused on the grounds of a syllogism with the form of a transcendental argument. In its first premiss it states something which, according to our trivial experience, is the case: 'meaning and content seem to be possible since we communicate'. The second premiss focuses on the conditions for the possibility of such meaning and content: 'meaning is possible upon the condition that there is something underlying it which is not contingent'; or in its negative form: 'if it is for meaning to be possible it should not be dependent upon mental intermediaries or any other contingent items (practices included)'. Then the conclusion more or less amounts to something like: 'there is something underlying meaning which is not contingent or indeterminate

60 This seems to be also the point of McCulloch, *The Mind and Its World*, 82.

61 Cf. Hurley, *Consciousness*, 233-234.

in they way mental intermediaries are'. This conclusion is far from clear about what this thing might be in positive terms. But if we take the powerful intuition of the transcendental argument combined with Wittgenstein's insistence on practices, we might be able to have a fresh go at practices and try to find a way not to treat them as contingent.

A first requirement for a fruitful exploitation of practices is to conceive them in a way that is consistent with Wittgenstein's prescription that there is a way of grasping a rule which is not an interpretation. Practices must be reconstructed as being interpretation-free (or *ratification-independent*⁶²) items or patterns, which lay at the level of the 'bedrock' or, in other words, at the bottom of any language, where justification reaches an end⁶³. But if one follows this path, all of a sudden, one realises that one can no longer feel comfortable within the dualistic mind-world picture. This is the moment when the theory of meaning has to seriously deal with the relation between the mind and the world and the problem of dualism.

BEYOND THE MIND – WORLD DUALISM

A number of commentators⁶⁴, who by and large share the concerns of the previous analysis, attempt to steer between the Scylla of mentalism and the Charybdis of scepticism by suggesting a different reading of Wittgenstein's discussion of practices and agreement. According to this view, practices are to be understood as something totally distinct from intermediaries. Wittgenstein's appeal to practices does not aim to compare them with all previous discredited intermediaries in order to make a case for their superiority. What Wittgenstein actually does, the argument goes, is to claim that a practice is not a third thing standing between a rule and its applications, hence that it is not a medium like the rest. This reading rests predominantly on sec. 201 of the *Philosophical Investigations* where Wittgenstein stresses the point that 'there is a way of grasping a rule which is not an interpretation'.

On this 'alternative' reading the relation between the rule and acts of its application is, rather, internal. Rule and acts of following make contact at the level of language⁶⁵ preventing therefore any gap to arise and any intermediary to be essential for bridging the gap. It is this internal relation or, in other words, 'what we call 'obeying the rule' and 'going

62 This is how McDowell calls them in his , 'Wittgenstein: On Following a Rule', *passim*.

63 Cf. McDowell, *ibid.* 274.

64 For a comprehensive account vide Hurley, *Consciousness*, 235 n.; also McDowell, 'Wittgenstein on Following a Rule', *passim*.

65 Cf. Hurley, *ibid.* 235.

against it' in actual cases' (PI, sec. 201) that provides for a way of grasping the rule which is not an interpretation. This emphasis on the interdependence between rules and acts of abiding by the rules offers a solution out of the infinite regress which usually undermines the employment of any intermediate entities. Baker and Hacker write:

The apparent logical gulf between a rule and its 'extension' arises from the mistaken assumption that understanding a rule is at least partly independent of how it is projected on to actions. But however it is formulated or explained, a rule is understood only if it is correctly projected. To be ignorant or mistaken about what acts are in accord with it is to be ignorant or mistaken about what the rule is⁶⁶.

But if the understanding of a rule is not at all independent of how it is projected on to actions, this means that the mind-world dualism can no longer be sustained. Meaning and content, which were alleged to inhabit the mind, are now placed within the world, within the actual applications of the rules or the practices and the contexts of human action. It is the context of action or, in other words, the practices, that provide for the concept's content and make meaning and understanding possible. Practices constitute the bedrock 'where our spades are turned' (PI, sec. 217) and where every interpretation or 'justification' reaches an end.

Giving grounds, however, justifying the evidence, comes to an end; -but the end is not certain propositions striking us immediately as true, i.e. it is not a kind of seeing on our part; it is our acting, which lies at the bottom of the language game⁶⁷.

On this contextualist reading⁶⁸ of Wittgenstein, meaning and understanding have to be placed within this 'acting' if they are to be something more than a blind reaction to a situation, or to be an attempt to act on an interpretation and still be a case of going by a rule. In the contextualist account practices and rules (as the two faces of the same coin) constitute a normative groundwork which is neither contingent upon, nor susceptible to interpretations. In this way the contextualist account is realist, can account for objectivity and, hence, it escapes scepticism.

66 G. P. Baker and P. M. S. Hacker, *Wittgenstein: Rules, Grammar and Necessity*, 97.

67 Cf. Wittgenstein, *On Certainty*, edited by G. E. M. Anscombe, G. H. v. Wright and P. Denis (Oxford: Blackwell, 1975), sec. 204.

68 Cf. Hurley, *ibid.* 236-237.

The contextualist account does not allow the mind-world gap to open in the first place. Practices are here constructed as parts of the environment that can account for mental content and meanings. This has the effect that the mind (and its contents) is constituted on an externalist basis, by using, as it were, worldly ingredients. This externalist account does away with dualism in a simple and straightforward way and spares one from the need to seek entities which, in order to be able to bridge the mind-world gap, need to possess self-interpreting properties (like images or ideas). Therefore practices do not need to be thought as self-interpreting entities or, on Hurley's successful expression, as *ultra-interpretations*⁶⁹.

Ultra-interpretations are in a very strong way connected to dualism: if the mind is radically separated from the world then the need arises for entities within the mind which possess the property to create (powerful and self-evident) connections to the world. This is the test that all ultra-interpretations fail: there is no such thing as one that can provide for its own interpretation in an unambiguous and indisputable way; hence, all ultra-interpretations end up being extended into an endless series of interpretations which prevents them from fulfilling their task as self-standing, ultimate points of reference or ratification-independent patterns. The ultra-claim to provide definitive interpretations, which is encapsulated in ultra-interpretations, is, through their failure to do so, transformed into an unfulfilled ultra-burden that exposes their total dependence on a radically sceptical *regressus ad infinitum*. Ultra-interpretations are rendered radically sceptical not on the ground of their initial claim (this is perfectly anti-sceptical), but because their inability to satisfy this claim deprives them of any possibility to stand as ratification- or verification-independent patterns which alone would enjoy and would provide for objectivity.

On the other hand practices, on the contextualist account, are not self-interpreting entities and therefore can be taken to constitute *ratification-independent patterns* which enjoy objectivity. Or, to use a somehow informal expression, practices are, in a way, able to provide for their own interpretation, only this is possible because it is happening without the dualist bit, i.e. not in another sphere which is independent of the world. To say this might be somehow misleading and inconsistent with the previous remark that there is nothing which could provide for its own interpretation. Nevertheless, the ability of self-interpretation seems in a way to be implicit in the assumption that practices in the contextualist account

69 Vide Hurley, *Natural Reasons*, 34-38.

enjoy the status of ratification-independent patterns: because how else, if not through its ability to be self-interpreting, can a pattern be ratification-independent? The alleged inconsistency is untangled by the fact that practices, as accounted for in a contextualist theory, do not actually pose the claim of being self-interpreting entities or ultra-interpretations because they do not need such a strong claim: unlike images and ideas they are not hidden in isolated vats (minds) and therefore their objectivity is the result of their public character and not of their capacity for a second order re-production or picturing of the reality. Whereas ultra-interpretations need to be re-interpreted and brought into accord with each other, practices lie on the same level as both the mind and the world and are therefore common to all minds. They have, in a way, undergone a naturalisation process. Naturalised practices do not need a second- (or third-, fourth-..., or v-) order interpretation (or any interpretation at all, which is almost the same as though they were already interpreted) in order to become common or objective to all minds, hence able to account for meaning and content. Therefore they do not succumb to an infinite regress but are ratification-independent, i.e. objective. Minds acquire their common ground as they participate in practices which unfold or happen and not because they possess entities that re-present the world. In this way the contextualist account of practices establishes a normative link to the objective world in order to account for the identity of what is in one's mind⁷⁰, rather than beginning with something that exists in one's mind. In the spirit of this contextualist reading of Wittgenstein's account of practices, Hurley writes:

[Wittgenstein's] point is...that it is a mistake to conceive of the relation between the mind and the world in such away that the need to postulate intrinsically self-interpreting entities of any kind arises...He appeals to practices...not as [such entities], but because he conceives them as identified in relation to and constitutively engaged with the world. His appeal to them is in effect a repudiation of the conception of the mind as independent of the world that gives rise to the problem which makes [self-interpreting entities] seem necessary⁷¹.

It seems that both contextualism and mentalism adhere to some form of realism. Owing to their different relation to dualism, however, each of the two realisms seems to lead to completely different results. Mentalism holds to something like a *realism in the mind* by postulating the existence of entities within the mind (images, ideas and other ultra-

70 Cf. Hurley, *ibid.* 237.

71 Vide Hurley, *Natural Reasons*, 35-36.

interpretations). Due to its dualist origin, realism in the mind cannot account for objectivity in meaning and understanding. Ultra-interpretations amount inevitably to an infinite regress of interpretations that undermines the possibility of establishing any connection to the external world, the further result being that a general or global scepticism about the external world and its existence arises. Meaning and understanding go astray along with the objectivity of the external world. They both fall into the dualistic trap by becoming dependent upon a contingent chain of interpretations which nurtures radical scepticism about meaning, content and the world.

Contextualism, on the other hand, supports something like a *realism in content and meaning* by establishing a normative link between the mind and the world (in the form of practices). Dualism falls and ultra-interpretations are rendered unnecessary. Practices (the world) stand on their own as objective, ratification-independent patterns which provide all minds with common contents. Realism in content and meaning, on this account, amounts to realism about the external world and can account for objectivity in a straightforward way⁷². Contextualism must be carefully distinguished from crude Platonism: Platonism allows the mind-world gap to open and then tries to bridge it, thus succumbing to the futile logic of intermediaries. On the contrary contextualism's main contribution is that it prevents in the first place the gap from opening. For this reason it can be, according to a successful expression, referred to as *relaxed Platonism*⁷³.

The paradox – on the level of the theory of meaning – which emerges by the fact that ultra-interpretations behave as ratification-dependent (not objective) entities, though they are self-interpreting, whereas practices are ratification-independent (objective) patterns, though they claim to be non-self-interpreting, can only be untangled if – on the level of the theory of knowledge – the issue of dualism is properly addressed: one is then able to understand that realism in the mind (ultra-interpretations and other items) becomes non-realism on the level of meaning, content and the world, whereas realism about meaning, content and the world rejects the existence of any entities in the mind. The former amounts to scepticism and to the loss of meaning and understanding, whereas the latter can successfully account for objectivity (ergo possibility) of meaning and understanding.

72 This conception of realism dovetails with the analysis of mind-independence in Ch III, *supra*.

73 Cf. Hurley, *Consciousness*, 236, where she also refers to McDowell's distinction between rampant and relaxed Platonism.

DETOUR: THE MYTH OF THE GIVING

Hurley, in her *Consciousness in Action*⁷⁴, detects an asymmetry which emerges from a privileged treatment of practices over experience in respect to the problem of content and meaning. According to Hurley this asymmetry ensues when one tries to abandon the Myth of the Given, or the idea that the content of experience can be treated as an unproblematic pre-given input, by shifting to intentional action as the unquestionable item that makes content and meaning possible (or what Hurley calls the *Myth of the Giving*).

In her account, Hurley treats Kant and Wittgenstein as members of the same philosophical tradition that attempts to undermine the naïve idea about the unquestionable character of perceptual experience. Philosophers belonging to this tradition argue that neither is there a pre-given unity of things nor can our experience of them be taken for granted. Hence, perceptual experience is not something given which imposes itself upon the mind. According to a characteristic Kantian expression, 'Combination does not lie in the objects'⁷⁵. It has rather to be reconstructed through the spontaneous activity of synthesis (Kant), which is predominantly an activity- or agency-involving procedure. However, Hurley goes on to argue, agency or intentional action cannot be, in turn, taken to enjoy any primitive or inherent ability to generate content, since that would require an answer to the problem of how intentional content is possible in the first place:

How can the activity of synthesis have the transcendental role of making content possible, when any role it plays will presuppose that intentions with content are possible? The view that unity depends on the transcendental role of the activity of synthesis leaves unexplained the source of the unity presupposed by conceiving of synthesis as an activity to begin with, as an expression of agency as opposed to merely a series of natural events⁷⁶.

The problem of the content is therefore as much a problem for action as it is for experience. By shifting from the unquestionable character of experience to some kind of intentional action which enjoys a strange charisma of pre-given content, one is just postponing the settlement of the problem of content and meaning, thus asymmetrically favouring the Myth of the Giving over the Myth of the Given. Both myths are equally misleading since no act (like no experience) can provide for its own content (or interpretation) and therefore one has no

74 Vide Hurley, *Consciousness*, 240-244.

75 Cf., *ibid.* 240.

good reason for favouring one over the other.

Hurley notes that holding to the Myth of the Giving while rejecting the Myth of the Given leads in many ways away from realism, into various forms of idealism. But to rescue some form of realism (like the one discussed in Chapter III), one need not return to an insensitive form of the given. It is much more fruitful to elaborate a balanced account (like the previous contextualist account) which would unify action and experience in a way that would demonstrate that only perceivers are agents and vice-versa⁷⁷. Such an account would reject both myths and still be able to subscribe to realism. Under this light Hurley suggests that Wittgenstein's appeal to practices (i.e. forms of life) should be read not as a practice-oriented asymmetry but as a way of avoiding both myths by recognising the interdependence of experience and practice within forms of life.

We can correct the traditional philosophical subordination of agent to subject without going to the opposite extreme. We can adopt a sophisticated, activity-laden view of experiential content, without taking intentional content as primitive in the ways associated with the myth of the giving. What is needed, rather, is to understand why it is no accident that only perceivers are agents, as well as why it is no accident that only agents are perceivers: to understand the interdependence of perception and action. There is no apparent reason this cannot be done compatibly with realism⁷⁸.

Though this reasoning escapes the scope and the ambitions of the present discussion, I would venture a comment on the asymmetry of action and perception in respect to moral/practical concepts. In a unified (presumably contextualist) account the content of theoretical concepts is undoubtedly defined in a stronger sense by the existence of the natural/physical environment (through a healthy account of experience as a normative concept

76 Cf., *ibid.* 241.

77 This seems to be also the pivotal insight of Apel that underlies his programme of the transformation of the Kantian Critique of Pure Reason into a 'Critique of Language'. Apel locates the commencement of this enterprise in the *Tractatus* where Wittgenstein is taken to argue that language is not merely the (transcendental) condition of the possibility of describing facts but at the same time the condition of the possibility of the facts themselves as existing states of affairs. Language is in this way taken to be inescapably interwoven with experience. What Wittgenstein does not yet see in the *Tractatus* is that language apart from its semantics and syntax has also a third pragmatic level. This last level concerns agency among speakers and can be shown to transform language and communication into an agency-related activity. This pragmatic level, Apel holds, constitutes, together with the other two levels of language, a transcendental condition of experience (as the existence of facts as states of affairs) and therefore can be assumed to indicate that the role of the perceiver and the agent cannot be disconnected convincingly. For a brief, albeit reliable, account of the evolution of Apel's argument, vide Apel, *From a Transcendental-Semiotic Point of View*, 9-42.

78 Cf., Hurley, *Consciousness*, 242.

intermediated by our agency). This seems to imply a domination of the aspect of the given in the domain of theoretical knowledge.

On the other hand the content of moral or practical concepts and other terms has to do with normative entities and objects which are revealed through practices or as a presupposition of them. To that extent practical concepts and terms are rather to be accounted for in connection with practices (the Giving). In other words, in this case, the content of 'practical experience' would be practices rather than material entities. In a more holistic context, of course, these practices usually 'unfold on top' or supervene upon the physical world or make use of the physical world, but again here, like before, there seems to lurk an asymmetry to the extent that agency seems to be able to account better for the Practical.

In any case what is important in Hurley's remarks is that every form of perception is an act of perception, that is, perception is necessarily intermediated by action and vice-versa. Therefore, if there is anything like action-guiding norms which apply to the domain of agency as general presuppositions or constraints of intentional action, their power will also extend to perception (as action).

MENTALISM: ULTRA-INTERPRETATIONS

It would not be an oversimplification to say that in a mentalist account of content and meaning the actual bearers of meaning are interpretations. Ultra-interpretations, or representations in the mind, are conceived in such a way that they cannot be linked to the world unless the proper interpretation are employed. They just stand there in the mind as normatively inert entities, or 'mental' sign-posts which, in themselves, do not signify anything before they are interpreted. What we need in order to establish a normative connection to the world 'is not that item, whatever it was, considered in itself, but that item under the right interpretation'⁷⁹. But then the question 'which is the right interpretation' cannot be answered by the fact of the mental sign-post's standing-there, with the result that any interpretation could be made to be the right one. And if one tries to block this indeterminacy by further employing another item from 'the restricted inventory' of mental items one can appeal to, the story repeats itself:

It does not matter what item, from the restricted inventory, we pick on as a plausible candidate to be what someone's putting the right interpretation on, say, the heard instruction "Add 2" (or anything

79 Vide McDowell, 'Meaning and Intentionality', 265.

else) might consist in. Whatever it is, it cannot be what we hoped it would be, since considered in itself it in turn just “stands there like a sign-post”. We might be tempted to require putting the right interpretation on the item that was supposed to be an interpretation, but that is clearly to embark on a regress, which looks as if it must be hopeless. The item that is supposed to be the right interpretation of the first putative interpretation will shrink in its turn, under the requirement of fitting into the restricted inventory of available items, into something that “just stands there”. So the very idea of a person’s understanding, as something that determines a distinction between behaviour that is in accord with the understanding and behaviour that is not, comes under threat⁸⁰.

Meaning and content as being in accord with or as abiding by a rule, as a normative enterprise in other words, seem to come under threat in a mentalist/dualist account. If mental items and processes in general are like sign-posts with versatile use, then accord to a rule, or a thought, or an intention is akin to accord with a contingent interpretation. Which is not far from saying accord to nothing or accord to anything. Thus, instead of taking states of affairs in the world to correspond to forms of mental content in a determinate way, dualism forces one to relate mental content to contingent interpretations. Along these lines, if one has a thought about, say, ‘today’s rainy weather in Hamburg’, it is not the rainy weather in Hamburg that is decisive for the content of one’s thought but an interpretation which, if one is lucky, might establish the link between rainy weather in Hamburg and one’s thought⁸¹. Without that amount of luck, however, any weather in Hamburg can be taken to constitute the content of the thought ‘today’s rainy weather in Hamburg’.

To this contingency and the total loss of the notion of accord is juxtaposed the (anti-representationalist) contextualist account of content and meaning⁸² that mainly endeavours to establish a normative link between mental contents and states of affairs in the world. This normative link is established by not allowing the mind-world gap to open or, as it were, by not disconnecting mental contents from worldly states of affairs. This normative link provides for certainty of content and meaning: Content and meaning, under this account, can be shown to reach ahead of any actual performance of the users. To this limited extent, and only to this, contextualism can be claimed to constitute a healthy form of Platonism⁸³.

80 Ibid. 266.

81 This is a modified version of an example offered by McDowell, *ibid.* 270-271.

82 For such an account, vide generally the work of John McDowell and in particular his ‘Wittgenstein on Following a Rule’ in Moore (ed.), *Meaning and Reference*; also his ‘Meaning and Intentionality in Wittgenstein’s Later Philosophy’ in McDowell, *Mind, Value and Reality*.

...the label 'Platonism' is also used for ideas that are simply part of the conception of meaning as reaching normatively into the world: for instance the idea that the meaning of, say, an instruction of extending a numerical series ...reaches forward in the series ahead of anyone who actually works the series out, and is so to speak already there waiting for such a person, ready to stand in judgement over her performance, at any point she reaches in the series⁸⁴.

Interpretations are incapable of establishing the normative link between worldly states of affairs and mental contents. It is rather language games, practices and forms of life that are able to conceive meaning as a normative concept by generating the normative link between mind and the world. Accordingly, a contextualist account discards the idea of interpretation as the last instance of grounding content and meaning and concentrates upon language games, practices and forms of life as the successful candidates for a normative conception of meaning and content.

CONTEXTUALISM: FORMS OF LIFE AND CONSTRAINTS OF INTERPRETATION

Language-games

If one reads the private language argument under the light of the contextualist assumption then its exegesis reveals an argument for a normative link between mind and the world as the only means that can account for the normativity of content and meaning. On this reading the private language argument cannot be regarded as occupying an isolated position within the *Philosophical Investigations* (PI) but has to be brought into connection with another concept that is also seminal to the PI, i.e. the language-game. In order to establish a connection between language and action Wittgenstein employs what he calls 'the whole, consisting of language and the actions into which it is woven, the 'language-game''⁸⁵. By operating this concept Wittgenstein endeavours to locate the normative content or the presuppositions of meaning and content within the realm of human agency. Language-games fulfil the role of substantiating the normative link between the mind and the world. The normativity of meaning derives then from the language-games (as a more elaborate concept for practices or 'customs') within which we employ meanings. They put together the 'bedrock' or the normative basis of our language. Language-games reveal or – more accurately – can reveal the

83 Vide McDowell, 'Meaning and Intentionality', 273-274.

84 Cf., Ibid. 273-274.

85 Vide Wittgenstein, *Philosophical Investigations*, sec. 7.

norms or the rules by which meanings, as instances of rule-following, abide.

Transcendental necessity

The normativity at the level of the bedrock of our language can be taken to constitute a transcendental necessity, as long as one does not want to be deprived of meaning as a normative concept; these are the lines along which the relevant transcendental argument could be conceived⁸⁶:

P1 – Meaning as a normative concept exists.

P2 – For meaning to be normative there are necessarily ratification-independent patterns.

C – Ratification-independent patterns necessarily exist.

This normativity at the level of the ‘bedrock’ is richer than a mere collection of linguistic rules concerning the use of symbols and words⁸⁷. It is a normativity tied up with agency and practice and therefore can be assumed to incorporate a certain amount of practicality (in the sense of action-relevance). Accordingly, the bedrock-level contains at least some norms or patterns that possess a strong pragmatic/practical character which emanates from the interpersonal relations between the agents(-perceivers). This pragmatic/action-related dimension flows through the totality of the acts of cognition and action which constitute the relevant language-game. The content of this pragmatic/practical dimension is more or less that perceivers-as-agents should acknowledge some rules of conduct which guarantee their mutual recognition as participants of the language-game and, therefore, guarantee the successful employment of the language-game. Since the normative content at the bedrock is presupposed with a transcendental necessity so are these latter norms/patterns that we labelled practical. The transcendental necessity of the norms at the bedrock-level does not mean that they constitute a super-rigid machine, independent of any practice, but that they can be con-

86 McDowell, in his effort to refute anti-realist accounts of meaning, seems to offer a similar transcendental argument when he says that one cannot do without ratification-independent norms at the level of the bedrock, as long as one does not wish to abandon the idea of the normativity of meaning. Vide McDowell, ‘Wittgenstein on Following a Rule’. For an authoritative account of the ‘anti-realist’ view which does not accept ratification-independent patterns as necessary presuppositions of the determinacy of meaning, vide B. Hale, ‘Rule-following, Objectivity and Meaning’ in B. Hale and C. Wright (eds.), *A Companion to the Philosophy of Language* (Oxford: Blackwell, 1999), 369-396.

87 For such a rich conception of bedrock-normativity one needs to refer to a series of universal-pragmatic norms that are presupposed by any practice of communication, along the lines of the discourse rules which are advanced by Apel’s Transcendental-pragmatics and Habermas’ Universal-pragmatics (cf. with Ch V).

ceived only through our practice; yet at the same time as presuppositions of this practice. These norms function as prerequisites of our practice in the sense that, if we do not presuppose them, we cannot understand our practice. At the same time, it is only within our practice that we can 'unveil' them or become aware of them. They are, in other words, prior to, but also present only within, our practice/language-game⁸⁸. To that extent the normative content of the bedrock can be easily compared and even identified with the universal pragmatic presuppositions of speech which are worked out by the *Transzendental- and Universalpragmatik* of Apel and Habermas⁸⁹. The main difference here, however, is that these norms cannot be assumed as referring strictly to the realm of speech since they are action-guiding patterns connected to human agency. Furthermore this is not just an alternative way of presenting things. The transcendental-pragmatic presuppositions of speech cannot be revealed to be other than action-guiding norms.

The morality of the bedrock

This line of argument can be pursued even further towards the establishment of more substantive conclusions. The scope of the practical content of the bedrock is not restricted to a value-free or neutral employment of the language-games in a sheer purposeful way. In other words, the interpersonal relations of the agents/speakers do not just entail (or prescribe) strategic rules which just aim to facilitate any kind of communication, to the effect that they stand neutral towards any conceivable form of communication. It is rather the case that the normative bedrock imposes a series of non-optional moral standards upon communication that function as constraints, outlining the morally permissible within communication. This assumption mainly rests on the simple fact that within our *overall language-game or form of life*⁹⁰ there are necessarily some language-games which are rendered possible only against the presupposition of a specifically moral relation between the speakers-as-agents. These 'moral' language-games gain their moral dimension through the performance of some specific speech-acts that constitute an elementary component of any language-game. The

88We could say that communal practice in this second context constitutes *merely the heuristic* boundaries of the normative groundwork, and in this way, enables persons to *criticise* other persons or even the community. It is precisely this *reflective/critical* attitude that is obliterated in the so-called 'non-realist' view since the communal practice defines at all times, constantly, the rules and thus can never be criticised of breaking them (which though could very often be the case...).

89 Vide the analysis in Ch. V, *supra*.

90 I am using the term 'form of life' as a broader concept referring to the totality of communication which contains a variety of language-games as the more particular domains that refer to thematically specified domains of speech-as-action. Furthermore speech-acts will stand for the components of

stipulated moral dimension ensues owing to the practical/moral constellation which these speech-acts launch between those who employ them. Traditionally the speech-acts which are taken to incorporate or to reveal such moral contents are the elementary speech-acts of assertion and questioning⁹¹.

If, according to the contextualist assumption, the content of a concept is gained/established against the background of the performance of the relevant rule (embedded in the associated practice) which governs the application of a concept, then the content of 'assertion' must lie in the way (practice) of making an assertion (or raising a question, etc.). But the way of making an assertion is by connecting to it, explicitly or implicitly, a claim to truth/correctness⁹². Whenever I say 'the cat is in the garden' or 'abortion should be allowed', my statement implies, on the pain of a performative contradiction⁹³, that I further allege or claim that this is also the case (or that it is right, in the case of abortion). But if this point is made explicit, it is further easy to imagine that on the other end of the line, corresponding to the claim to correctness, stands an *obligation for justification* through means of the speech or discourse (here as a neutral concept). These claims can be further refined and combined with more claims and all of them, taken together, can be organised into a group of norms or rules that govern communication. Robert Alexy lists about 29 rules that regulate communication as a rational discourse along with the, so-called, *Diskursprinzip* which pos-

language-games thus denoting the elementary unit of language-as-action.

91 In a more comprehensive account, these speech-acts can be assumed to emerge from domains or spheres of human agency which can not be avoided by any human being. Martha Nussbaum in an attempt to ground a non-sceptical or non-particularist reading of the Aristotelian virtues holds that there are some inescapable contexts in relation to which every human being has to react (vide Nussbaum, 'Non-Relative Virtues: An Aristotelian Approach' in M. Nussbaum and A. Sen (eds), *The Quality of Life* (Oxford: Clarendon Press, 1993), 242-269). These elementary contexts constitute, according to Nussbaum, the baseline of agreement for the conceptual content of corresponding virtues (moral imperatives) in a non-optional way. Virtues, on this account, become fully-fledged moral guidelines only after they are worked out in specific cultural and historical contexts. Nevertheless, their relevance for human agency is based upon elementary contexts which no human being can avoid (p. 244-247). Therefore whenever people argue about the content of a virtue 'they are arguing about the same thing, and advancing competing specifications of the same virtue' (p. 247). The great merit of this alternative way of grounding the transcendental relevance of morality for agency notwithstanding, it seems to me that the approach through the elementary speech-acts is more suitable for a unified account of perception and agency through language. On top of this Nussbaum's account refers from the outset to the realm of agency and does not directly purport to address issues of meaning and content, which is rather the case within the present account. I am indebted at this point to Prof. Susan Hurley for drawing my attention to the parallels with Nussbaum's line of argument. For a very interesting attempt to explain the reasons of divergence between accounts of justice and virtue, while at the same time to restore the unity between universalism and particularism, vide Onora O'Neil, *Towards Justice and Virtue* (Cambridge: Cambridge UP, 1996), Ch. 1.

92 Vide Ch. V, supra.

93 For the concept of the performative contradiction, vide Ch. V, supra.

tulates the universalisation of all practical norms that are claimed to be right within a discourse⁹⁴.

According to this picture the reality of our practices and language-games comes along with the 'reality' of a series of normative claims whose existence is demonstrated transcendently, in the form of a *sine qua non conditio*, as presupposition of the specific practices. The reality (or the existence) of the normative claims means that the communicating persons stand in a non-optional normative relation to each other. This is so because *these normative claims only make sense when one ascribes some moral qualities to the communicating agents*. In this way a claim to correctness or an obligation for justification makes sense only if one assumes that the communicating parties are equal and free agents. These moral qualities can clearly be viewed as imperatives regulating all communication, but also as setting the correctness criteria according to which the claim to correctness, raised through the particular speech-acts, can be judged. If it is the case, as implied earlier, that the meaning of 'assertion', as a rule-guided concept, reaches forward ahead of anyone who actually performs an assertion then the validity of its moral background is also imposed on any future use as a standard of correctness. Accordingly the understanding of the concept 'assertion' implies the validity of some non-optional moral presuppositions

This is a pivotal point of the argument and, needless to say, calls for more elaboration: what constitutes the moral/normative reality is not the *use* or *employment* of what we called the 'moral' speech-acts taken on their own. The grounding of the normative reality is performed at a higher level, namely that of the normative claims which necessarily escort the relevant speech-acts. These claims are not yet assumed to be moral imperatives themselves. But they possess the unique ability to *actually place speakers/agents in a mutual relation which is morally significant*. This interpersonal relation generates the normative presuppositions of perception and agency through communication. The latter can be envisaged as categorical imperatives corresponding to a concept of communicating agents as moral persons.

This relation among communicating agents as moral persons has a stable, unalterable character, hence it cannot be exchanged for any other current or random constellation that would deny the predominately moral personhood of the communicating agents. At least not as long as communication cannot afford losing the elementary moral speech-acts of assertion and questioning and the corresponding concepts of justification and explanation.

94 Vide Ch. V, *supra*.

In this sense the moral groundwork of communication constitutes a standard which regulatively refers to the totality of our practical/normative meanings and discourses. Against the background of this standard one can measure the correctness of the employment of normative or evaluative concepts, as well as the appropriateness of the employment of our practical/moral speech-acts and language-games. But, one would ask, 'isn't it the use or practice of their employment that determines the content of concepts like, say, 'right', 'just', or 'equal' to the effect that, any change in practice would amount to a change in meaning/content'? And indeed it is; but this practice or employment has its limits in the basic concept of the moral person.

The concept of the moral person functions, as it were, like the boundary within which we are able to understand our moral constructions, according to the maxim 'we understand what we fabricate'. Of course this commitment to the authority of the moral person is a general and 'in the last instance' commitment. Practical concepts, complex or simple, acquire their full content through their every day use and the engagement in specific contexts. But this specific elaboration of their full content is legitimised only to the extent that it does not violate the imperatives which derive from the underlying concept of the moral person. The content of the concept, say, 'equality' could never be legitimately shaped to mean 'all persons except those who are...' (at least not without a justification that would be in its turn in accordance with the notion of moral personhood). The 'local' use of normative and evaluative concepts cannot, on this account, override the fundamental concept of the moral person and the imperatives it entails. It is rather the case that the employment of practical concepts in 'local' language-games can only be meaningful against the normative background of personhood.

It is further interesting to observe that the concept of the moral person more or less generates the common denominator of the meaning of our concepts. It is like if a pragmatic concept which derives from the constellation amongst agents would possess the stability to fix (even as a negative constraint) the semantic content of concepts. I will call this pragmatic stability a *transcendental-pragmatic stability*, meaning the stability which comes before and precedes the elaboration of meanings on the semantic level. It is upon this transcendental-pragmatic stability that the *conceptual agreement* of all communication is based. To use a more figurative expression, meanings do not stand on their own like sign-posts but carry their point with them; this point resides within the pragmatic/normative presuppositions of speech as communication. Disagreement about practical and evaluative concepts turns out, on this account, not to be a different-meaning case, or a case of radical incompre-

hensibility in which the engaging parts just talk past to each other, but rather a *same-meaning – different-belief* case in which the parts are disputing about different conceptions (or nuances) of the same concept.

The pragmatic presuppositions of communication and the concept of moral person are assumed to concern the totality of our language-games, practical and theoretical. Their impact upon evaluative/practical ‘moral’ language-games is, as already argued, straightforward. On the one hand they prescribe the rules according to which practical language-games should be performed and on the other they set the standards which shape the content of practical/evaluative concepts. But this is just half the story. ‘Moral’ language-games are not isolated but constitute unavoidably part of our form of life. To the extent that they provide an answer to the question ‘what shall I do?’ or to the extent that they prescribe positive moral ‘oughts’ they can be assumed to constitute negative moral constraints to any other value-free domain of our overall language-game (or form of life). This rests upon the assumption that *perceivers are at the same time always agents and therefore whenever they act as perceivers they are also subjected to the norms which regulate their identity as agents*. Accordingly, even ‘value-free’ language-games are subjected to the transcendental-pragmatic presuppositions of communication, by being subjected to the moral point of their value-laden ‘neighbours’. Value-free language games do not acquire directly a moral dimension but they may well do so indirectly, through their employment within the form of life. In a way it is this integration in the broader context of communication that gives them determinate content (like isolated sign-posts are rendered meaningful by being integrated in the broader context).

MORAL PERSONS AND CONSTRAINTS OF INTERPRETATION

The pragmatic-practical presuppositions of our diverse language-games point towards the inescapable (transcendental) existence of a set of moral imperatives which ascribe to agents/perceivers a moral dimension or value. Despite what might seem a contrary first appearance, the later work of Wittgenstein does not aim to restrain the range of the unavoidable character of the moral/practical requirements of meaning and understanding⁹⁵. The diversity of language-games, often mentioned by Wittgenstein, does not purport to reduce the normative content of the bedrock to a language-game bound normativity. It

95 Onora O’Neil argues for the contrary in her *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 17; 80-87.

shouldn't be thought that each language-game rests on its own local normativity with the result that no normative requirements are universal for all language-games, hence that normativity is in the best of cases relative. The contextualist account, as previously employed, rather shows that there is a species of language-games, those that I called the 'moral' language-games, which impose constraints on the meaning and content of concepts and intentional states. These language-games show that the transcendental necessity of language for knowing and describing the world is not a necessity of a formal medium that absorbs all dimensions of the reflecting perceivers-agents. It is rather the case that perception and agency through language rest upon the *autonomy* of the perceivers/agents and the possibility of their self-reflection upon the presuppositions or requirements of their perceiving and acting. It is this autonomy or ability of self-reflection which is encapsulated within the (elementary) moral language-games. This is not a case of *petitio principii*. It is not the case that we establish the moral language-games as necessary because we want to arrive to autonomy thus begging the question. Rather, it is the fact that we cannot avoid the moral language games which demonstrates the inescapable requirement of autonomy.

Apel's Grundnorm of communication

Apel makes a very similar claim by employing what he takes to be the 'transcendental language game' of philosophical discourse⁹⁶. This is the language game within which it shall be possible to question all other language-games but which cannot be itself transcended or put in question. It is within this ultimate or elementary language-game where reflection upon the possibility of all argumentation takes place and hence the presuppositions of all meanings are substantiated. If we deny its fundamental character then all reflection upon what we do, know and mean has, in the best of cases, the worth of a temporary 'ladder' which needs constantly to be thrown away or substituted, hence being in itself unable to ground the possibility of meanings. Contrary to this self-refuting idea, it seems that the elementary 'moral' language-games, taken to constitute something like the transcendental language-game of communication, may provide for a unification of our diverse language-games into what can be called the *human form of life*.

The *human form of life* consists in those normative-practical presuppositions that are rooted in a group of transcendental elementary pragmatic conditions which provide for the semantic certainty amongst the various language-games. Besides, the human form of life

96 Vide K.-O. Apel, *From a Transcendental-semiotic Point of View*, 17-19.

– on this account – entails a picture of *perceivers/agents as autonomous moral persons*. The totality of the elements of the normative groundwork which put together the human form of life force us, as an imperative with categorical merit, to treat all agents and perceivers as moral persons. Not only in the realm of language, as Habermas thinks, but also within agency and perception. Apel tries to capture this normative requirement of all agency and perception via language by employing what he takes to be the prescriptive dimension of Discourse-ethics (*Präskriptive Dimention der Diskursethik*). According to this thought there is a dimension of discourse which goes beyond the narrow boundaries of speech and language and extends upon agency (and perception). This dimension rests upon a moral/ethical *Grundnorm* which prescribes that:

All beings who are capable of communicating via language ought to be acknowledged as persons⁹⁷.

According to this imperative every *potential* participant of discourse is an autonomous person and, further, he or she should acknowledge all others as autonomous persons. This Grundnorm can be taken to constitute the content of the Norm of Autonomy (NoA), that was earlier⁹⁸ introduced as the transcendental-substantive norm that delimits the metaphysical possibility of all practical knowledge⁹⁹

By employing the Grundnorm as a transcendentially grounded normative requirement of communication/discourse, Apel endeavours to relieve the tension resulting from a strict and unconvincing separation between action and language which is favoured and defended by Habermas. It is easy to see why: if the discourse (meaning, communication, and so on) rests, in the last instance, upon an ethical Grundnorm (or NoA), then a reciprocal acknowledgement of all potential discourse participants is granted. From that it follows that a merely linguistic/pragmatic interpretation of the normative groundwork of discourse cannot be justified. Adela Cortina writes,

...[the] Grundnorm constitutes that indispensable dimension of the discourse-principle which does not emphasise the aspect of the

97 Cf. K.-O. Apel, 'Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik', in K.-O. Apel, *Transformation der Philosophie vol 2: das Apriori der Kommunikationsgemeinschaft*, 4th edn (Frankfurt am Main: Suhrkamp, 1988), 358-435 (400). The necessity of the Grundnorm is also accepted by Adela Cortina in her 'Diskursethik und Menschenrechte', in *ARSP* 76 (1990), 37-49.

98 Vide CHs IV and V, *supra*.

99 It should be noted that in Apel's theory the ethical Grundnorm of the Discourse enables not only practical but all kind of knowledge (i.e. including theoretical). Vide his 'Das Apriori der Kommunikationsgemeinschaft', 395-405 and 415n..

norms but prescribes the endorsement of all able for communication beings as persons¹⁰⁰.

However important the introduction of the Grundnorm may be, there are a few reasons for which Apel's justification of the Grundnorm would need to be modified in order to be able to support his claim for a unified treatment of action and language.

The Norm of Autonomy as a 'Fact of Reason'

Apel seems to believe that the only difficulty in the way of admitting something like an ethical Grundnorm into the normative groundwork of Discourse consists in the possibility that such a norm might not be valid unconditionally i.e. *categorically* (kategorisch). In his 'das Apriori der Kommunikationsgemeinschaft' Apel expresses the concern that the content of an ethical Grundnorm could be interpreted as being valid only *hypothetically*, that is, only in connection to the speakers explicit or implicit will to accept the validity of such a norm¹⁰¹. Were this the case, Apel argues, then the validity of the norm could be made dependent upon some *empirical judgement* concerning the conditions under which speakers accept the norm in connection to any context of communication or to specific contexts of communication. Such an explication of the validity of the Grundnorm in empirical terms would make the categorical, unconditional character of the moral Grundnorm vulnerable to the objection that it is not good enough for the justification of an 'ought' to derive it from an 'is'. Connectedly Apel argues that the categorical character of a substantive (action-guiding) Grundnorm requires a justification that shows that the validity of that norm cannot be subsumed under some sort of 'naturalistic fallacy'.

For that reason Apel advances the claim that the issue of the validity of a moral Grundnorm is *not* an empirical issue. The reason he offers is that our will to accept the Grundnorm is not empirically conditioned but instead it is itself the transcendental condition for any meaningful discussion of any empirical hypotheses: *to the extent that we appreciate that our discussion concerning the conditions of communication has to be meaningful, we cannot but accept the categorical or unconditional character of the Grundnorm which is implicit in the will for communication*¹⁰². Put in this way the validity of the Grundnorm of

100 A. Cortina, 'Diskursethik und Menschenrechte', 44.

101 Apel, 'das Apriori', 415–423.

102 'Das Apriori', 415. Accordingly the transcendental grounding of the Grundnorm can be performed along the lines of a performative contradiction that entails the validity of that norm; for that method of transcendental 'deduction' vide Ch. V.

communication constitutes an objective reality, or some kind of fact. However in constituting a fact the validity of the Grundnorm does not constitute some sort of empirical fact but rather a transcendental inescapable fact, akin to something like Kant's *Faktum der Vernunft*¹⁰³, upon which rests the possibility of any form of meaningful speech. Thus construed the moral Grundnorm of the discourse is categorically valid.

In a way Apel's argument takes for granted that the Grundnorm of communication is a substantive (i.e. action-guiding) norm, and it merely tries to establish its categorical character. This creates the following problem: even if the Grundnorm is proved to be categorically valid within the realm of discourse, its action-guiding character could still be disputed. That is, one could maintain that critical reflection upon the presuppositions of communication through language can only amount to the grounding of rules that refer to speech/the use of language and not to action. Moreover, if this turns out to be the case, then Apel's Grundnorm is rendered *hypothetical* on grounds that escape his transcendental reasoning: the Grundnorm can be considered hypothetical insofar as it is possible to conceive action independently from speech/communication. The likelihood of such a possibility increases with an account of practice that leaves room for any sort of mind-environment dualism, as it is the case with the interpretation of Wittgenstein's private language argument undertaken by discourse-theory (including Apel's variant). Within the dualist environment of such an account there is nothing that could block the interpretation that practice (as incorporating tokens of action) escapes the limits of discourse while the latter refers merely to internal mental processes that can be characterised independently from the environment (and, hence from practices of any sort). Then action, as an activity that is located in the environment rather than in discussions or in forms of inferential reasoning, can take place outside the sphere of discourse. This would further lead to the conclusion that Apel's ethical Grundnorm would be categorically valid only in relation to discourse but not to action. In other words that it would be rather a norm for the regulation of speech rather than of action/agency.

Clearly such a conclusion is not sufficient for the aims of the present project (neither it is for Apel's philosophical programme). But that need not worry us. Apel's transcendental reasoning can still be proved to be useful as long as the implicit dualism that resides in the theoretical premisses of discourse-theory is replaced with the results of the interpretation of the private language argument that were suggested earlier in this chapter. Once we

103 Cf. Apel, *ibid.* 417-419.

dispense with the dualist picture, Apel's transcendental reasoning acquires the holistic dimension it intended to acquire all the way long. This is, roughly how the rehabilitation of the transcendental argument would run:

Once language and meaning are shown to be intertwined with action/agency in the way an anti-representational theory of content would have it (CHs II, III, IV), then the transcendental argument would be applicable to both discourse and action: The moral Grundnorm, or the Norm of Autonomy, can be then shown to be a necessary presupposition not only for the meaningfulness of speech but also of action. Thus, paraphrasing Apel one could say that: *to the extent that we appreciate the fact that our action as well as our speech have to be meaningful, we cannot but accept the categorical or unconditional character of the Grundnorm which is implicit in the will for acting and communicating*¹⁰⁴.

This formulation agrees with a conception of practical norms as being (abstract) objects that are not of our minds' making and which constitute the concept 'action' as a concept whose content lies outside our heads.

MEANING AND DISAGREEMENT

On the human-form-of-life account meanings are deeply determined by pragmatic or normative-practical considerations and cannot any longer be viewed having the formalised rigidity they were assumed to have under centralist semantic theories of the type of the criterial model¹⁰⁵. In an account where there is no mind-world dualism and where meanings are not located in the head, the ideal-typical understanding of meaning as something crystallised which is able to anticipate the dynamic of the world without belonging to it, changes drastically. What shapes meanings and the concepts' contents are pragmatic contexts which evolve through interaction with the world. Their practical dimension makes meaning a normative concept with a (practical) point. This 'point' is that quality which can account for predictability or certainty for the future cases (meaning as rule-following) without the need for any set of pre-given semantic criteria.

On this account normative (but also non-normative) meaning can be taken to depend roughly upon two levels of pragmatic contexts which eventually compose its practical point. On the first level there are the local pragmatics of the marginal language-games; on the second level there are the (non-alterable) universal pragmatics of all communication

104 Cf. fn. 104, supra.

105 Vide the discussion in Ch. I, supra.

(which entail NoA). Under this conception the point of meaning is constructed according to a piecemeal procedure in which local and universal pragmatics play the role of interpretative constraints. Certainty of content and meaning is therefore generated in association with pragmatics both susceptible to revision (local pragmatics) and unalterable (transcendental-pragmatics). Certainty in the last instance is guaranteed by the transcendental pragmatics (NoA) which pose non-exchangeable or absolute constraints of interpretation.

These remarks help, in retrospect, to realise an important difference between the role of interpretations in the composition of meaning in the two juxtaposed accounts of mentalism and contextualism. They also offer us an opportunity to repair the heavily discredited reputation of interpretations which occurred through our previous analysis. In mentalism (or in any dualistic account of content and meaning) interpretations carry the burden to account for content and meaning in the last instance. And we saw the reasons why they fail. Under the contextualist picture interpretations are not, in any case, rendered useless but just not suitable to carry in the last instance the burden of content and meaning. A contextualist account succeeds in showing that if we don't let the mind-world gap open up, then it is the pragmatic parameters of meaning and content which actually provide for their determinacy, hence make content and meaning possible. It shouldn't be thought, though, that interpretations in a contextual account are futile. Interpretations are still our most important means to interact with the world. The difference is, however, that the pragmatic parameters (both the more marginal and the transcendental) function as *constraints for our interpretations*¹⁰⁶. They don't allow interpretations to become indeterminate and therefore unable to generate meaning. Interpretations, on another expression, just incorporate our effort to capture the 'point' of our concepts. Whereas the pragmatic parameters set the outer constraints of this 'point'. Upon interpretations we manage to enrich the content of our concepts by performing something like a hermeneutic circle. The pragmatic presuppositions provide for the permissible span of the spiral movement, show us in which direction interpretations should evolve.

Interpretation and disagreement

Constraints of interpretations are set by the (transcendental) pragmatic presuppositions of communication and are neither optional nor themselves the products of interpretation¹⁰⁷.

106 Hurley also opts for constraints of interpretation; vide Hurley, *Natural Reasons*, 36-38.

107 Cf., *ibid.* 37.

These constraints generate agreement in the human form of life by constituting, as it were, something like the *structure or formula of the human form of life*. Against their background all disagreement can be explained as local *substantive disagreement* which rests upon a global form of *conceptual agreement*¹⁰⁸. Disagreement in this way is taken to be a same-meaning-different-belief-case where those who disagree still follow the same rule and it is not taken to be a different-meaning case where the disputing parties are following different rules and speak past each other. In this picture the pragmatic presuppositions of communication and the concept of moral person they impregnate, provide for the conceptual common ground or the interpretative constraints which render all cases of disagreement rational procedures of reconciling different beliefs (substantive disagreement). On the contrary in a dualistic account, where ultra-interpretations have the last word, disagreement is not possible since each one of the disputing parties can always insist that they follow a different rule, hence that they are right under any circumstances (conceptual disagreement).

The importance of the above account becomes apparent in the case of the discussion about complex evaluative concepts like 'just', 'good', 'right', or 'law', 'morality', etc. Those concepts have been called *essentially contested concepts*¹⁰⁹ because their meaning can be defined only through complex substantive disagreement which presupposes:

...a baseline of agreement regarding paradigm cases, the relevant criteria, the rules of constructing theories about the criteria (how to determine whether the concept applies when the criteria conflict), and paradigm examples of such theorising¹¹⁰.

The discussion about these concepts is meaningful only against the background of a comprehensive human form of life. The human form of life guarantees a baseline of semantic agreement, on the ground of which substantive arguments about the precise definition of those complex concepts can be exchanged. These substantive arguments form rival interpretations which compete to capture in the best way the content of the contested concept at issue. Their common reference to the contested concept is generated by the underlying agreement in the human form of life which at the same time dictates the outer limits for the validity of the interpretations' content. Competing interpretations are taken to constitute

108 This idea is employed by various authors in order to account for disagreement in law and morality without endorsing relativism. Vide R. Dworkin, *Law's Empire*, CHs 2 and 3; S. L. Hurley, *Natural Reasons*, Ch 3; Stavropoulos, *Objectivity in Law*.

109 Vide Hurley, *Natural Reasons*, 46-50.

110 Ibid. 47, 48.

merely different conceptions of the same concept against the background of the transcendental-pragmatic presuppositions of communication and the concept of the moral person which they generate.

On the other hand, the discussion about essentially contested concepts shows clearly that NoA and the concomitant concept of autonomous persons neither automatically solves all problems concerning the meaning of normative concepts, nor provides for a complete 'how-to-do-it' guide for any concrete application-case. The perception of all potential discourse participants as persons may, namely, generate semantic certainty and successful communication, but cannot guarantee the transparency of other persons in relation to their conception of the good and their personal experiences or preferences. This means that the substantive level of the employment of interpretations, which compete for the definition of complex legal or moral concepts, is of great importance and should by no means be forgotten or omitted. All these interpretations, when viewed through a different angle, can be envisaged as corresponding to different 'thick' conceptions of the good which may be harmonised after being subjected to the scrutiny of the 'thin' normativity of the transcendental moral person. Substantive disagreement (or the employment of competing interpretations) is not, therefore, to be performed in a contingent way but has to respect a series of (interpretative) constraints which may well be taken to be both procedural and substantive in their nature.

As a result, even if one prefers to organise substantive disagreement into rational practical discourses, according to the Habermasian model, the rules which will be responsible for their regulation (discourse-rules) can only halfway be conceived as being procedural. Amongst them there will always be those categorical norms which embody the conception of the autonomous person. Procedural rules, in this context, should be understood merely as *hypothetical imperatives* in relation to the *categorical norms* that correspond to the normative conception of the autonomous person. The intuition underlying this line of argument is the idea that the claim to correctness raised by legal and broadly normative propositions is inescapably interwoven with the idea of the autonomous moral person to the degree that only autonomous moral agents are interested in justified norms. Thus the way in which the claim is justified is important only at a latter stage, though it can not be contingent. It has to correspond in the best way to the idea of the autonomous person, and it has indeed to be discourse-procedural. For the question however, which propositions fall under the moral point of view (and need to be justified within proper rational discourses), decisive is their raising of the claim to correctness and not the fact of their having been the object of a ra-

tional discourse (this would constitute a *petitio principii*, since the point is precisely to decide which propositions should be subjected to practical discourses, in other words which propositions are practical).

A last point concerning practical norms of law and morality is that, according to the suggested interpretation of the Wittgensteinian argument, the meaning of the propositions that depict them is, to a great extent, interwoven with the pragmatic-normative presuppositions of speech. On the level of the ontology of the corresponding practical (moral, legal and other ethical) norms, this has the implications spelled out by the 'semantics-exhausts-ontology' thesis¹¹¹. Insofar as the moral meaning of every practical norm depends on the transcendental norms of communication, then the ontological autonomy (irreducibility) of legal and, broader, practical norms lies, at the end of the day, in their dependence upon the transcendental norms of communication which foster a concept of discourse participants as autonomous persons.

111 Vide CHs II, III and IV, *supra*.

CONCLUSIONS

Using Hart's analysis of the concept of law, the discussion of law's normativity was initially recast in terms of *reductionism*. Connectedly it was argued that in order to account for the irreducible normative properties of legal phenomena one has to account for two distinct aspects of legal discourse: its *ontological foundation* and its *action-guiding force* (normativity).

The first task, namely to account for law's ontology, was referred to a semantic explication of ontology. Using arguments from contemporary metaphysics and ontology the thesis argued that the semantic structures of language are sufficient in offering an account of the ontological structure of the environment. Along these lines it was tendered that the semantic structures of legal sentences reveal the existence of legal norms and broadly legal entities which were classified as abstract objects (alongside with numbers, games of chess, novels, Mahler's symphonies and so on), in juxtaposition to physical objects that are usually classified as concrete objects (tables, chairs, trees and so on). The important advantage that the semantic account of law's ontology carries with it is the ability to account for the *objectivity* of the referents of legal expressions without making use of any notion of robust *objecthood*. Thus, instead of evoking the suspicion of some version of rampant Platonism, the semantic explication of ontology accounted for the objectivity of legal objects through the objectivity of the logical structure of (legal) semantics. In all, the semantic account of law's ontology made possible to corroborate the claim that there exist irreducible legal entities which are depicted by legal discourse.

The second task, consisting in an analysis of law's action-guiding force, was tackled through an investigation into the pragmatic dimension of legal language. Other than in the ontological discussion, the account here focused predominantly on the meaning/content rather than the structure of legal discourse. Departing from a theory of meaning-as-use the discussion argued that the meaning of legal (and broadly normative) sentences and expressions should be understood as being generated by the *acts of uttering* (using) sentences and expressions. Along these lines it was tendered that meaning/content is embedded in a broader *communicative practice* of interaction between speakers as agents and the environment. This practice is underpinned by a series of pragmatic rules which hold it together as a meaningful whole and which further determine linguistic meaning by laying down validity standards for the employment/utterance of sentences and expressions. To that extent the pragmatic rules were explicated as transcendental presuppositions for communication *tout court*. Applied in the context of normative discourse these thoughts showed that the utterance of legal sentences necessarily rests on a pragmatic rule of *correctness*; this rule was

shown to require further that the transcendental-pragmatic rules which underlie communication be conceived of as action-guiding norms as well as being norms for speech. The upshot of this line of argument was that the transcendental-pragmatic rules that validate *legal/normative meaning* point to a fundamental norm (Grundnorm) of communication which prescribes that 'all beings who are capable of communication through language should be acknowledged as autonomous persons'. Connectedly it was argued that insofar as legal and moral meaning/content are validated by the same Grundnorm, *law is a special case of morality (Sonderfallthese)*.

Parallel to the discussion of the presuppositions of legal meaning the dissertation offered a deeper justification of the idea that meaning and communication are intertwined with action/agency by advancing an *anti-representationalist* account of mental content. This account consists, roughly, in the idea that mental content cannot be characterised independently from the environment and, further, that it is acquired via the way knowers interact with the environment as agents. Along these lines it was maintained that the practice of acquiring content and meaning is intrinsically linked with agency, the result being that the normative patterns of content/meaning rest on the more fundamental patterns of agency.

Taken conjointly, the anti-representationalist theory of content and the pragmatic analysis of (normative) meaning served the purpose of underpinning the link between the two aspects of the anti-reductionist argument in respect to law – the semantic-ontological and the pragmatic-normative – by establishing three important theses: *first* that mental content can be individuated through semantic structures; *second* that mental content is acquired through agency (more accurately: through the interaction of knowers-as-agents with the environment); *third* that agency is intelligible only against the background of a series of transcendental norms that contain a fundamental Norm of Autonomy. The combination of these theses supports the conclusion that norms' ontology, i.e. the semantic structures of the relevant sentences, is constrained by the content of the transcendental norms that regulate agency and communication.

All in all, the dissertation exploits the two dimensions of language that are necessary for the antireductionist argument concerning law: on the one hand the *referential dimension* of language, to the effect that it shows that language is employed in order to depict things that exist independently of our minds' making; on the other hand the *pragmatic-normative dimension* by evoking the presuppositions upon which meaning (and specifically normative meaning), and broadly communication, is enabled. The combination of these two dimensions makes a strong case for the irreducibility of legal discourse: whereas the refer-

ential function of language guarantees that there are things (i.e. legal entities) that exist objectively as part of the environment, the pragmatic function succeeds in accounting for the content or the meaning of the expressions that depict those normative objects. Further, since the project unfolds on the supposition that language exhausts ontology, the pragmatic aspect becomes *constitutive* in the description of norms' ontology. In this way the pragmatic aspect is able to account for the *evaluative or internal aspect of rules*, which, according to Hart, produces a feeling of commitment to those who appreciate it, and which cannot be attained at only on the basis of ontological accounts, let alone reductionist ontological accounts.

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